

APPENDIX

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MICHAEL RODAK, JR., CLERK

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1974

No. 73-1742

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RUSSELL E. TRAIN, ADMINISTRATOR, UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY AND THE  
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,  
*Petitioners*

—v.—

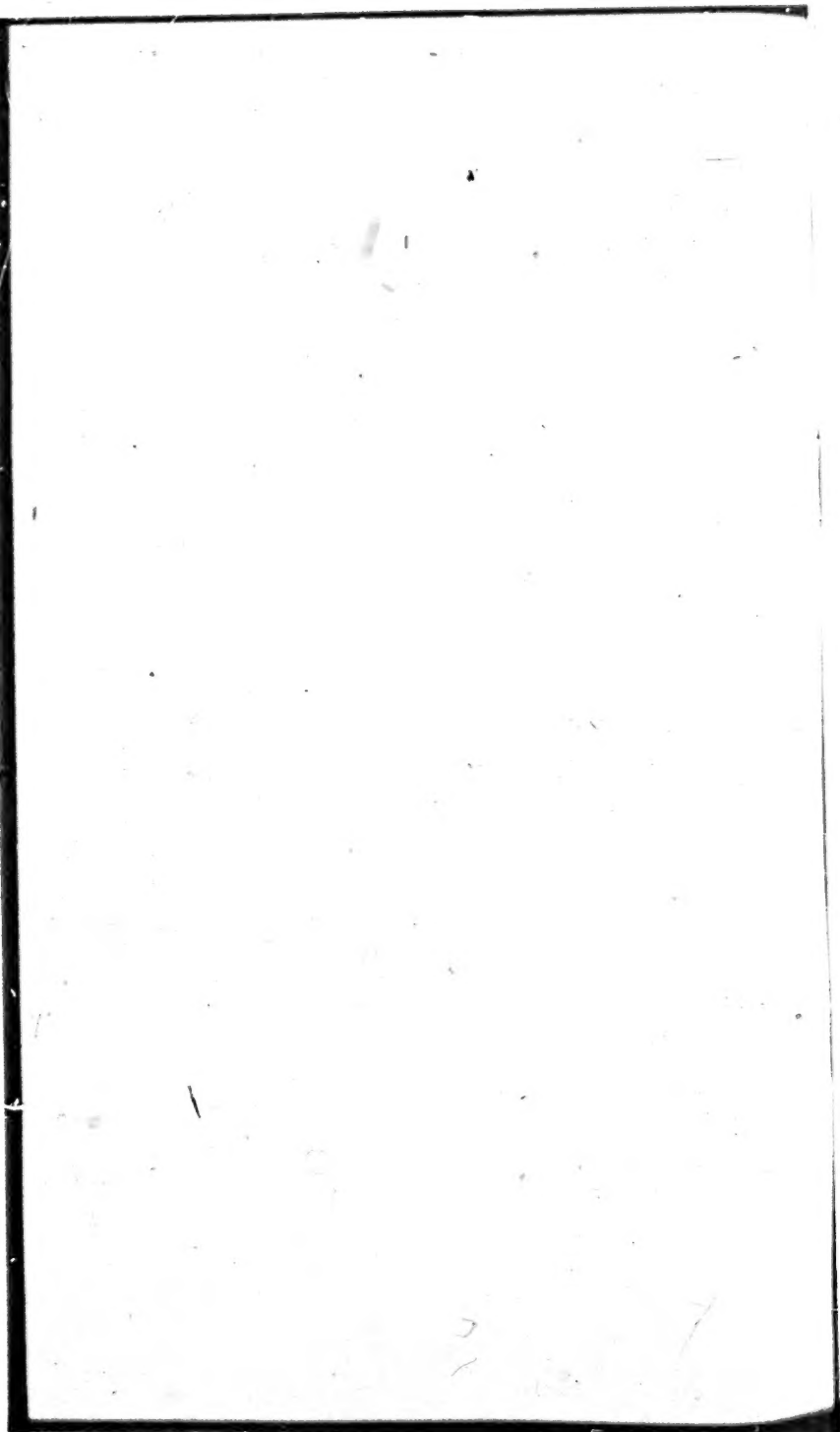
NATURAL RESOURCES DEFENSE COUNCIL, INC.,  
SAVE AMERICA'S VITAL ENVIRONMENT,  
JANE WEBER, AND SUSANNE ALLSTROM

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ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR CERTIORARI FILED MAY 20, 1974  
CERTIORARI GRANTED OCTOBER 15, 1974





IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1974

No. 73-1712

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RUSSELL E. TRAIN, ADMINISTRATOR, UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY AND THE  
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*Petitioners*

—v.—

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## RELEVANT DOCKET ENTRIES

June 30, 1972	Filed petition for review
September 12, 1972	Filed certified list of documents
September 13, 1973	Filed notice of election Rule 30(c)
November 15, 1972	Filed brief of Petitioner (NRDC)
December 26, 1972	Filed brief of Respondents
January 26, 1973	Filed reply brief of Petitioners
January 30, 1973	Filed Supplemental Certified Index of Record in lieu of Record
February 20, 1973	Filed Appendix
August 22, 1973	Filed copy of Georgia implementation plan
February 8, 1974	Filed court's opinion
March 25, 1974	Filed denial of Respondent's Motion for Stay of Mandate
June 12, 1974	Filed notice from United States Supreme Court that Respondent's Motion for Stay of part III of mandate granted

## Title 40 Protection of Environment

### Subpart A—General Provisions

#### 151.1 Definitions.

As used in this part, all terms not defined herein shall have the meaning given them in the Act:

(a) "Act" means the Clean Air Act (42 U.S.C. 1857-1857f), as amended by Public Law 91-604, 84 Stat. 1676).

(b) "Administrator" means the Administrator of the Environmental Protection Agency (EPA) or his authorized representative.

(c) "Primary standard" means a national primary ambient air quality standard promulgated pursuant to section 109 of the Act.

(d) "Secondary standard" means a national secondary ambient air quality standard promulgated pursuant to section 109 of the Act.

(e) "National standard" means either a primary or a secondary standard.

(f) "Owner or operator" means any person who owns, leases, operates, controls, or supervises a facility, building, structure, or installation which directly or indirectly results or may result in emissions of any air pollutant for which a national standard is in effect.

(g) "Local agency" means any local government agency, other than State agency, which is charged with the responsibility for carrying out a portion of a plan.

(h) "Regional Office" means one of the ten (10) EPA Regional Offices.

(i) "State agency" means the air pollution control agency primarily responsible for development and implementation of a plan under the Act.

(j) "Local agency" means any air pollution control agency other than a State agency, which is charged with responsibility for carrying out a portion of a plan.

(k) "Point source" means:

(1) Any stationary source causing emissions in excess of 100 tons (90.7 metric tons) per year of any pollutant for which there is a national standard in a

region containing an area whose 1970 "urban place" population, as defined by the Bureau of Census, was equal to or greater than 1 million or

(2) Any stationary source causing emissions in excess of 25 tons (22.7 metric tons) per year of any pollutant for which there is a national standard in a region containing an area whose 1970 "urban place" population, as defined by the U.S. Bureau of the Census, was less than 1 million and

(3) Without regard to amount of emissions, stationary sources such as those listed in Appendix C to this part.

(l) "Area source" means any small residential, governmental, institutional, commercial, or industrial fuel combustion operations; onsite solid waste disposal facility; motor vehicles, aircraft, vessels, or other transportation facilities; or other miscellaneous sources such as those listed in Appendix D to this part, as identified through inventory techniques similar to those described in: "A Rapid Survey Technique for Estimating Community Air Pollution Emissions," Public Health Service Publication No. 999-AP-29, October 1966.

(m) "Region" means (1) an air quality control region designated by the Secretary of Health, Education, and Welfare or the Administrator, (2) any area designated by a State agency as an air quality control region and approved by the Administrator, or (3) any area of a State not designated as an air quality control region under subparagraph (1) or (2) of this paragraph.

(n) "Control strategy" means a combination of measures designated to achieve the aggregate reduction of emissions necessary for attainment and maintenance of a national standard, including, but not limited to, measures such as:

(1) Emission limitations.

(2) Federal or State emission charges or taxes or other economic incentives or disincentives.

(3) Closing or relocation of residential, commercial, or industrial facilities.

(4) Changes in schedules or methods of operation of commercial or industrial facilities or transportation sys-

tems, including, but not limited to, short-term changes made in accordance with standby plans.

(5) Periodic inspection and testing of motor vehicle emission control systems, at such time as the Administrator determines that such programs are feasible and practicable.

(6) Emission control measures applicable to in-use motor vehicles, including, but not limited to, measures such as mandatory maintenance, installation of emission control devices, and conversion to gaseous fuels.

(7) Measures to reduce motor vehicle traffic, including, but not limited to, measures such as commuter taxes, gasoline rationing; parking restrictions, or staggered working hours.

(8) Expansion or promotion of the use of mass transportation facilities through measures such as increases in the frequency, convenience, and passenger-carrying capacity of mass transportation systems or providing for special bus lanes on major streets and highways.

(9) Any land use or transportation control measures not specifically delineated herein.

(10) Any variation of, or alternative to, any measure delineated herein.

(o) "Reasonably available control technology" means devices, systems, process modifications, or other apparatus or techniques, the application of which will permit attainment of the emission limitations set forth in Appendix B to this part, provided that Appendix B to this part is not intended, and shall not be construed, to require or encourage State agencies to adopt such emission limitations without due consideration of (1) the necessity of imposing such emission limitations in order to attain and maintain a national standard, (2) the social and economic impact of such emission limitations, and (3) alternative means of providing for attainment and maintenance of such national standard.

(p) "Compliance schedule" means the date or dates by which a source or category of sources is required to comply with specific emission limitations contained in an implementation plan and with any increments of progress toward such compliance.

(q) "Increments of progress" means steps toward compliance which will be taken by a specific source, including:

(1) Date of submittal of the source's final control plan to the appropriate air pollution control agency;

(2) Date by which contracts for emission control systems or process modifications will be awarded; or date by which orders will be issued for the purchase of component parts to accomplish emission control or process modification;

(3) Date of initiation of on-site construction or installation of emission control equipment or process change;

(4) Date by which on-site construction or installation of emission control equipment or process modification is to be completed; and

(5) Date by which final compliance is to be achieved.

(r) "Transportation control measure" means any measure, such as reducing vehicle use, changing traffic flow patterns, decreasing emissions from individual motor vehicles, or altering existing modal split patterns that is directed toward reducing emissions of air pollutants from transportation sources.

(s) "Vehicle trip" means any movement of a motor vehicle from one location to another that results in the emission of air pollutants by the motor vehicle.

(t) "Trip type" means any class of vehicle trips possessing one or more characteristics (e.g., work, nonwork; peak, off-peak; freeway, nonfreeway) that distinguish vehicle trips in the class from vehicle trips not in the class.

(u) "Vehicle type" means any class of motor vehicles (e.g., precontrolled, heavy duty vehicles, gasoline powered trucks) whose emissions characteristics are significantly different from the emissions characteristics of motor vehicles not in the class.

(v) "Traffic flow measure" means any measure, such as signal light synchronization, freeway metering and curbside parking restrictions, that is taken for the purpose of improving the flow of traffic and thereby reducing emissions of air pollutants from motor vehicles.

(w) "Roadway type" means any class of roadway facility that can be broadly categorized as to function and assigned average speed and capacity values, e.g., expressway, arterial, collector, and local.

(x) "Time period" means any period of time designated by hour, month, season, calendar year, averaging time, or other suitable characteristics, for which ambient air quality is estimated.

[36 FR 22308, Nov. 25, 1971, as amended at 37 FR 26311, Dec. 9, 1972; 38 FR 15195, June 8, 1973; 38 FR 15835, June 18, 1973]

#### § 51.5 Submission of plans; preliminary review of plans.

(a) Submission to the Administrator shall be accomplished by delivering five copies of the plan to the appropriate Regional Office and a letter to the Administrator notifying him of such action. Plans shall be adopted by the State and submitted to the Administrator by the Governor as follows:

(1) For any primary standard, within 9 months after promulgation of such standard.

(2) For any secondary standard, within 9 months after promulgation of such secondary standard or by such later date prescribed by the Administrator pursuant to Subpart C of this part.

(3) For compliance with the requirements of §§ 51.11 (a) (4) and 51.18, no later than August 15, 1973.

(b) Plans for different regions within a State may be submitted as a single document or as separate documents.

(c) Upon request of a State, the Administrator will provide preliminary review of a plan or portion thereof submitted in advance of the date such plan is due. Such requests shall be made in writing to the appropriate Regional Office and shall be accompanied by five copies of the materials to be reviewed. Requests for preliminary review shall not operate to relieve a State of the responsibility of adopting and submitting plans in accordance with prescribed due dates.

(d) Submission to the Administrator shall be accomplished by delivering 10 copies of the transportation control portions of the plan to the appropriate regional office. Such portions shall be adopted by the State and submitted by the Governor.

(e) Upon request of a State, the Administrator will provide preliminary review of the draft transportation control measures or portions thereof in advance of the date such measures are due. Such requests shall be made as provided in paragraph (c) of this section and shall not operate to relieve a State of its responsibility for adopting and submitting transportation control measures in accordance with prescribed due dates.

[36 FR 22398, as amended at 38 FR 15195, June 8, 1973, 38 FR 15836, June 18, 1973]

#### § 51.6 Revisions.

(a) The plan shall be revised from time to time, as may be necessary, to take account of:

(1) Revisions of national standards,

(2) The availability of improved or more expeditious methods of attaining such standards, such as improved technology or emission charges or taxes, or

(3) A finding by the Administrator that the plan is substantially inadequate to attain or maintain the national standard which it implements.

(b) The plan shall be revised within 60 days following notification by the Administrator under paragraph (a) of this section, or by such later date prescribed by the Administrator after consultation with the State.

(c) The plan may be revised from time to time consistent with the requirements applicable to implementation plans under this part.

(d) Any revision of any regulation or any compliance schedule pursuant to paragraph (c) of this section shall be submitted to the Administrator no later than 60 days after its adoption.

(e) Revisions other than those covered by paragraphs (a) and (d) of this section shall be identified and described in the next semiannual report required by § 51.7.



(f) Any revision shall be submitted only after any applicable hearing requirements of § 51.4 have been satisfied.

[37 FR 22398, Nov. 25, 1971, as amended at 37 FR 26312, Dec. 9, 1972]

\* \* \* \* \*

#### § 51.15 Compliance schedules.

(a) (1) Each plan shall contain legally enforceable compliance schedules setting forth the dates by which all stationary and mobile sources or categories of such sources must be in compliance with any applicable requirement of the plan. Such compliance schedules shall contain increments of progress required by paragraph (c) of this section.

(2) A plan may provide that compliance schedules for individual sources or categories of sources will be formulated following submittal of the plan. Such compliance schedules shall be submitted to the Administrator within 60 days following the date such schedule is adopted but in no case later than the prescribed date for submittal of the first semiannual report required by § 51.7: *Provided, however, That compliance schedules for nitrogen oxides required for stationary source shall be submitted to the Administrator no later than the prescribed date for the submittal of the second semi-annual report required by § 51.7. Where submission of compliance schedules is deferred by a State under this subparagraph, the plan shall specify a final compliance date applicable to each source subject to an applicable requirement of the plan. Compliance schedules submitted pursuant to this subparagraph shall require each source or category of sources to comply with such requirement within the times specified in paragraph (b) of this section but in no event later than the date specified in the plan for final compliance with such requirement.*

(b) (1) Any compliance schedule designed to provide for attainment of a primary standard shall provide for compliance with the applicable plan requirements as expeditiously as practicable and in no case, except as pro-

vided by Subpart C of this part, later than the date specified for attainment of such primary standard pursuant to § 51.10(b).

(2) Any compliance schedule designed to provide for attainment of a secondary standard shall provide for compliance with the applicable plan requirements in a reasonable time and in no case, except as provided in Subpart C of this part, later than the date specified for the attainment of such secondary standard pursuant to § 51.10(c).

(c) Any compliance schedule or revision thereof extending over a period of more than 1 year from the date of its adoption by the State agency shall provide for legally enforceable increments of progress toward compliance by each affected source or category of sources: *Provided however:* That increments of progress shall not be required for a compliance schedule which does not extend beyond January 31, 1974. Increments of progress shall include, where practicable, each increment of progress specified in § 51.10(q) and shall include such additional increments of progress as may be necessary to permit close and effective supervision of progress toward timely compliance.

[37 FR 26312, Dec. 9, 1972]

\* \* \* \* \*

#### § 51.32 Request for 1-year postponement.

(a) Pursuant to section 110(f) of the Act,<sup>1</sup> the Governor of a State may request, with respect to any stationary source or class of moving sources, a postponement for not more than 1 year of the applicability of any portion of the control strategy.

(b) Any such request regarding sources located in an interstate region shall show that the Governor of each State in the region has been notified of such request.

(c) Any such request shall clearly identify the source(s) and portion(s) of the control strategy which are the subject of such request and shall include informa-

<sup>1</sup> Defined term (Clean Air Act) see definitions.

tion relevant to the determinations required by section 110(f) of the Act.

(d) A public hearing will be held, before the Administrator or his designee, on any such request.

(e) No such request shall operate to stay the applicability of the portion(s) of the control strategy covered by such request.

(f) A State's determination to defer the applicability of any portion(s) of the control strategy with respect to such source(s) will not necessitate a request for postponement under this section unless such deferral will prevent attainment or maintenance of a national standard within the time specified in such plan: *Provided, however,* That any such determination will be deemed a revision of an applicable plan under § 51.6.

[36 FR 22398, Nov. 25, 1971, as amended at 38 FR 15958, June 19, 1973]

\* \* \* \* \*

§ 52.572 Approval status.

The Administrator approves Georgia's plan for attainment and maintenance of the national standards.

[37 FR 19808, Sept. 22, 1972]

\* \* \* \* \*

39 Fed. Reg. 34533-34535

Title 40—Protection of Environment

CHAPTER I—ENVIRONMENTAL  
PROTECTION AGENCY

SUBCHAPTER C—AIR PROGRAMS

[FRL 261-7]

PART 51—REQUIREMENTS FOR PREPARATION,  
ADOPTION, AND SUBMITTAL OF  
IMPLEMENTATION PLANS

PART 52—APPROVAL AND PROMULGATION  
OF IMPLEMENTATION PLANS

Variances, Enforcement Orders, and  
Confidentiality Provisions

DEFERRAL OF IMPLEMENTATION PLAN REQUIREMENTS

During the past 12 months, four Circuit Courts of Appeal have addressed the question of whether a state may extend a source's compliance date under the State's implementation plan without satisfying the substantive and procedural requirements of Section 110(f) of the Clean Air Act (Act). Three of these courts—the First, Second and Eighth Circuits<sup>1</sup>—held that source compliance dates could be deferred through the mechanism of a State-issued and EPA-approved variance or enforcement order but only up to the attainment date for meeting the primary ambient air quality standards. In most instances, the date for meeting the primary standards is no later than July 31, 1975. However, in some air quality control regions (AQCRs), primary standards attainment dates have been deferred up to two years through extensions granted under authority of Section 110(e) of the Act.

<sup>1</sup> Natural Resources Defense Council, Inc. (NRDC) et al. v. EPA, 478 F.2d 875 (1st Cir. 1973), NRDC et al. v. EPA (Nos. 72-1728 and 72-2165, 2nd Cir., March 13, 1974), NRDC et al. v. EPA, 483 F.2d 690 (8th Cir. 1973).

From a technical standpoint, the pronouncements of the three circuit courts referred to above can be treated as applying only to those States which are within the jurisdiction of the courts. However, the Administrator believes that when three appellate courts uniformly resolve an issue which is common to every state, the decisions of the courts should be accepted as strongly persuasive guidance for Agency action in all states. Accordingly, the Administrator has determined that the proper course of action is to revise 40 CFR Part 51 (Regulations for Preparation, Adoption, and Submittal of Implementation Plans) to be consistent with the decisions of the courts, and to simultaneously disapprove in 40 CFR Part 52 (Approval and Promulgation of Implementation Plans) the provisions in all plans which have deferral authority inconsistent with the terms of 40 CFR Part 51 as revised. This revision and disapproval are published as final rulemaking in another part of this FEDERAL REGISTER. Regulations limiting the issuance of variances, enforcement orders or other state-initiated measures designed to defer compliance with the applicable plan are proposed below for all states. Those proposed regulations will supersede the variance portion of the June 11, 1974 proposal (39 FR 20511) for the State of Washington. This action is being taken so that the regulatory language will be uniform for all states. For the same reason these regulations are being proposed for Indiana, Iowa, Massachusetts, and Rhode Island, even though regulations were promulgated previously for these states.

The fourth appellate court<sup>2</sup> to address the issue of compliance date deferrals held that section 110(f) of the Act is the exclusive means of deferring a compliance date even where the deferral does not go beyond the date for attaining primary standards. It is the Administrator's opinion that compliance dates which do not go beyond applicable attainment dates for primary or secondary standards should be dealt with as a plan revision pursuant to 40 CFR 51.6 and 51.8. Accordingly, the Agency has requested the Supreme Court to review

<sup>2</sup> NRDC et al. v. EPA (N. 72-2402, 5th Cir. February 8, 1974).

the Fifth Circuit Court's opinion and to stay the decision of the court pending the outcome of the review. On June 10, 1974, the Supreme Court granted both requests. However, the Fifth Circuit opinion, unless overturned by the Supreme Court, represents the law in the six-state area encompassed by the boundaries of the Fifth Circuit. Therefore, although the Part 51 and related Part 52 actions announced herein will apply to these states if the decision of Fifth Circuit on this issue is overturned, final Agency action on this matter must await the decision of the Supreme Court. The variance and/or enforcement order provisions presently contained in implementation plans for the six affected states will, however, be subject to the categorical disapproval notice which is also being announced herein.

As indicated above, there may be instances where, pursuant to the provisions of section 110(e) of the Act, the attainment date for meeting a primary standard in a given AQCR has been extended beyond 1975. Where such an extension has been granted, revised § 51.32(f) provides that compliance date deferrals which go no further than the extension date may be issued without looking to the provisions of § 110(f) of the Act. However, such deferrals will be subject to the requirement that they apply only to those sources for which technological inability served as the basis for the section 110(e) extension. In addition, the compliance date reflected in such deferrals must still be based upon that degree of progress which, under the circumstances, is as expeditious as can practicably be required of the source.

In distinguishing between the "pre" and "post" attainment date periods for meeting a primary standard it appears that the First, Second and Eighth Circuits were limiting their holdings to those compliance date provisions which were part of a control strategy for meeting a primary ambient air quality standard. Nevertheless, the Agency construes the "pre" and "post" attainment date principle established by these courts in the realm of primary standards as a substantial indication of what must be done with respect to compliance date provisions designed to meet the secondary standards. Ac-

cordingly, the Part 51 revision promulgated below extends the "pre" and "post" attainment date dichotomy to the secondary standards and provides that (apart from relief obtainable under section 110(f)) no compliance date which is part of a control strategy designed to meet the secondary standards may be extended beyond the applicable attainment date specified in 40 CFR Part 52.

Unlike the mid-1975 date which, under section 110(a)(2)(A)(i), is generally the date for attaining the primary standards, the Clean Air Act provides no specific date for attaining the secondary standards, but, instead, instructs the states to adopt (and the Agency to approve) secondary standard attainment dates which are reasonable. Part 51, however, established mid-1975 as the reasonable date, subject to a State's showing that good cause existed for deferring the date. Many states have made such a showing. Accordingly, the Part 51 postponement provisions which apply to the secondary standards do not have a generally applicable attainment date.

With respect to variances aimed at secondary standard plan requirements, it has been contended that the approval of such variances would depend on a potentially difficult determination of whether the plan requirement being waived is necessary for attainment of primary versus secondary standards. The Administrator has considered this argument and found it to be unpersuasive. Where a plan contains a single control strategy for attainment of both primary and secondary standards, the attainment dates will be identical, thus making it unnecessary to distinguish whether a variance would prevent attainment of primary or secondary standards. Correspondingly, where the date for attainment of primary standards is different than the secondary standards attainment date, the plan contains separate control measures necessary for attainment of each standard. Thus, any variance could be easily associated with the control strategy for attainment of a specific standard.

Also as a result of the Fifth Circuit decision referenced above, § 52.26(b) is added below to make it clear that provisions in an implementation plan which either ex-

licitly or implicitly direct State officials, charged with constructing the terms of enforcement orders or variances, to give proper regard to availability of technology, source hardship, or economic burden can not be considered as a basis for approving a compliance date postponement which goes beyond the end limits established under Part 51 as revised herein. The new language has been added as a means of discouraging source-initiated State court litigation over the reasonableness of enforcement orders which have compliance schedule terms consistent with the requirements of Part 51 as revised herein. Without such qualifying language, it is feared that some sources might choose to litigate properly constructed compliance schedules issued by State officials on the ground that a later compliance date is warranted because of hardship, economic burden, or technological difficulties.

By contrast, the new language is not intended, in any way, to conflict with the existing Part 51 language which is contained in § 51.2(b) and (d). These two paragraphs, which have always permitted States to consider the cost-effectiveness of a control strategy as well as its social and economic consequences, still permit States to do so. However, the introduction of the new language referred to above makes it clear that these considerations cannot serve as the basis for issuing an enforcement order of granting a variance which has a terminal date that goes beyond the applicable end date established under the Part 51 revisions contained herein.

The Fifth Circuit decision involving the "source hardship" issue was not related specifically to variances and enforcement orders, but dealt with general enabling statutes which mandated such consideration in all state agency actions. The Court ordered the Administrator to disapprove the general statute in the Georgia plan. Although this disapproval is published below for the Georgia plan, the Administrator does not agree that it is necessary to disapprove such general provisions in all other state plans, since Part 51 allows such considerations under the specific circumstances noted above. Therefore, the provisions of § 52.26(b) only restrict the use of such



hardship provisions where it would conflict with the provisions of §§ 51.15(d) or 51.32(f) as revised below. By focusing on variances and enforcement orders, it is the Administrator's judgment that all illegal use of a generalized technological and "source hardship" provision will be prevented. This is consistent with the following statement in Fifth Circuit opinion: "It is, of course, appropriate for state air pollution control officials to take into account cost and feasibility factors in most circumstances; their doing so is proscribed only when those considerations are in conflict with considerations of public health," i.e., primary standards attainment dates.

Since the Part 51 revisions and the new Part 52 provision set forth below (as well as the plan disapprovals which derive from the Part 51 revisions) are the result of circuit court decisions, the Administrator finds that good cause exists for promulgating the revisions as immediately effective final rulemaking and for publishing the accompanying plan disapprovals as immediately effective final Agency action. For the same reason, § 52.26 is also being published as final Agency rulemaking and will also be effective on the date of publication. However, the Administrator feels that it would be appropriate to accept comments from the public and the affected States concerning the actions taken below. Comments may be submitted to the Environmental Protection Agency, Standards Implementation Branch, Research Triangle Park, North Carolina 27711, Attention Mr. Clark. All relevant comments received not later than 30 days after the date of publication of this notice will be considered, and where appropriate, revisions will be made. Comments received will be available for public inspection during normal business hours at the Office of Public Affairs, 401 M Street, SW., Washington, D.C. 20460.

The Administrator strongly urges States to modify their enabling legislation to be consistent with the revised Part 51 and new Part 52 requirements set forth below, and to submit such revised legislation to the Administrator for approval. Where approvable changes are sub-

mitted, the Administrator will revoke the disapproval issued below.

\* \* \* \* \*

Dated: September 19, 1974

JOHN QUARLES,  
*Acting Administrator.*

Parts 51 and 52, Chapter I, Title 40 of the Code of Federal Regulations are amended as follows:

1. In § 51.11, paragraph (g) is added as follows:

§ 51.11 Legal authority.

\* \* \* \* \*

(g) Enabling authority relating to the issuance of enforcement orders, variances, or other State-initiated measures designed to defer compliance with a plan requirement which is necessary for attainment of a national standard shall specifically provide for consistency with the following requirements.

(1) Except as provided in paragraph (g) (2) of this section compliance may not be deferred beyond the applicable attainment date specified in Part 52 of this chapter. Where a plan contains different attainment dates for primary and secondary standards (i.e., specific measures have been identified for attaining primary standards and additional measures have been identified for attaining secondary standards), a plan requirement necessary for attainment of primary standards may not

be deferred beyond the primary standards attainment date and a plan requirement for attainment of secondary standards may not be deferred beyond the secondary standards attainment date.

(2) Where the Governor of a State has requested, and the Administrator (under authority of section 110(f) of the Clean Air Act) has approved a compliance date postponement with respect to a given source, compliance may be deferred for such source only up to the expiration date of the 110(f) postponement.

(3) Where the Administrator has extended the date for attainment of a primary standard beyond July 31, 1975, pursuant to section 110(e) of the Clean Air Act, compliance with a plan requirement necessary for attainment of such primary standard may be deferred beyond July 31, 1975, only for the source or sources for which the extension was granted and only up to the expiration date of the 110(e) extension.

2. In § 51.15, paragraph (d) is added as follows:

§ 51.15 Compliance schedules.

\* \* \* \* \*

(d) Regulations relating to the issuance of compliance schedules in conjunction with or pursuant to enforcement orders, variances, or other measures designed to obtain compliance with a plan requirement which is necessary for attainment of a national standard shall specifically provide for consistency with the following requirements.

(1) Except as provided in paragraph (d)(2) of this section, compliance schedules may not set forth dates of compliance which extend beyond applicable attainment dates specified in Part 52 of this chapter. Where a plan contains different dates of attainment for primary and secondary standards, a compliance schedule for a source included in the applicable control strategy for attainment of primary standards may not set forth a date of compliance which extends beyond the attainment date for such primary standards, and a compliance schedule for a source included in the applicable control strategy for attainment of secondary standards may not set forth a

date of compliance which extends beyond the attainment date for such secondary standards.

(2) Where the Governor of a State has requested, and the Administrator (under authority of section 110(f) of the Clean Air Act) has approved a compliance date postponement with respect to a given source, the compliance schedule for such source may set forth a date of compliance only up to the expiration date on the 110(f) of postponement.

(3) Where the Administrator has extended the date for attainment of a primary standard beyond July 31, 1975, pursuant to section 110(e) of the Clean Air Act, compliance with a plan requirement necessary for attainment of such primary standard may be deferred beyond July 31, 1975, only for the source or sources for which the extension was granted and only up to the expiration date of the 110(e) extension.

(4) Any change to a compliance date shall not become part of the applicable plan until the change has been submitted to and approved by the Administrator as a plan revision under §§ 51.6 and 51.8 of this chapter.

3. In § 51.32, paragraph (f) is revised. As amended, § 51.32 reads as follows:

§ 51.32 Request for 1-year postponement.

\* \* \* \* \*

(f) A State's decision to defer the date by which a source must achieve compliance with an applicable plan provision will not necessitate a request for postponement under this section if the deferral meets the following requirements:

(1) Compliance is not deferred beyond the applicable attainment date specified in Part 52 of this chapter. Where a plan contains different dates of attainment for primary and secondary standards (i.e., specific measures have been identified for attainment of primary standards and additional measures have been identified for attainment of secondary standards), the applicable attainment date for the purposes of this paragraph shall be deter-

mined by whether the plan requirement being deferred is necessary for attainment of primary standards or secondary standards.

(2) Where the Administrator has extended the date for attainment of a primary standard beyond July 31, 1975, pursuant to section 110(e) of the Clean Air Act, compliance with a plan requirement necessary for attainment of such primary standard may be deferred beyond July 31, 1975, only for the source or sources for which the extension was granted and only up to the expiration date of the 110(e) extension.

4. In Subpart A of Part 52, the introductory paragraph of § 52.20 is amended as follows:

§ 52.20 Attainment dates for national standards.

Each subpart contains a section which specifies the latest dates by which national standards are to be attained in each region in the State. An attainment date which only refers to a month and a year (such as July 1975) shall be construed to mean the last day of the month in question. \* \* \*

5. In Subpart A of Part 52, § 52.26 is added as follows:

§ 52.26 Variances and enforcement orders.

(a) Subsequent to May 31, 1972, the Administrator reviewed state implementation plans to determine whether the plans will allow or permit the issuance of variances, enforcement orders, or other state-initiated measures designated to defer compliance with an applicable plan requirement after the dates specified in section 110 of the Clean Air Act for attainment of national primary and secondary ambient air quality standards. The review indicates that state plans generally are not consistent with the Clean Air Act in this regard. Accordingly, all state plans are disapproved to the extent that their enabling authority and regulations permit the deferral of compliance with applicable plan requirements beyond the statutory attainment dates specified in the Clean Air Act. This disapproval applies to all States listed in Subparts B through DDD of this part.

(b) No provision in a plan which either explicitly or implicitly directs a state official to take cognizance of source hardship, availability of technology, or economic burden may be construed to permit the issuance of a variance, enforcement order, or any other state-initiated deferral measure which has a terminal date for compliance that conflicts with the provisions of §§ 51.15(d) or 51.32 (f) of this chapter.

\* \* \* \*

39 Fed Reg. 34572-34574

[40 CFR Part 52]

[FRL 261-8]

APPROVAL AND PROMULGATION OF  
IMPLEMENTATION PLANSDeferral of Implementation Plan Requirements  
and Public Availability of Emission Data

During the past 12 months, four Circuit Courts of Appeal have addressed the question of whether a state may extend a source's compliance date without satisfying the substantive and procedural requirements of section 110(f) of the Clean Air Act (Act). Three of these courts—the First, Second and Eighth Circuits<sup>1</sup>—held that source compliance dates could be deferred through the mechanism of a State-issued and EPA-approved variance or enforcement order but only up to the attainment date for meeting the primary ambient air quality standards. In most instances, the date for meeting the primary standards is no later than July 31, 1975. However, in some air quality control regions (AQCRs), primary standards attainment dates have been deferred by extensions granted under authority of § 110(e) of the Act.

From a technical standpoint, the pronouncements of the three circuit courts referred to above can be construed as applying only to those States which are within the jurisdiction of the courts. However, the Administrator believes that when three appellate courts uniformly resolve an issue which is common to every state, the decisions of the courts should be accepted as strongly persuasive guidance for Agency action in all states. Accordingly, the Administrator has determined that the proper course of action is to revise 40 CFR Part 51 (Regulations for Preparation, Adoption, and Submittal of Implementation Plans) to be consistent with the deci-

<sup>1</sup> Natural Resources Defense Council, Inc. (NRDC) et. al. v. EPA, 478 F.2d 875 (1st Cir. 1973) NRDC et. al. v. EPA (Nos. 72-1728 and 72-2165, 2nd Cir., March 13, 1974) NRDC et. al. v. EPA, 483 F.2d 690 (8th Cir. 1973).

sions of the courts, and to simultaneously disapprove in 40 CFR Part 52 (Approval and Promulgation of Implementation Plans) the provisions in all plans which have deferral authority inconsistent with the terms of 40 CFR Part 51 as revised. This revision and disapproval are published as final rulemaking in another part of this FEDERAL REGISTER. Regulations limiting the issuance of variances, enforcement orders or other state-initiated measures designed to defer compliance with the applicable plan are proposed below for all states. These proposed regulations will supersede the variance portion of the June 11, 1974 proposal (39 FR 20511) for the State of Washington. This action is being taken so that the regulatory language will be uniform for all states. For the same reason these regulations are being proposed for Indiana, Iowa, Massachusetts, and Rhode Island, even though regulations were promulgated previously for these states. When finalized, the regulatory language proposed herein will supersede the extant variance regulations for these states.

The fourth appellate court<sup>2</sup> to address the issue of compliance date deferrals held that section 110(f) of the Act is the exclusive means of deferring a compliance date even where the deferral does not go beyond the date for attaining primary standards. It is the Administrator's opinion that compliance date deferrals which do not go beyond applicable attainment dates for primary or secondary standards should be dealt with as a plan revision pursuant to 40 CFR 51.6 and 51.8. Accordingly, the Agency requested the Supreme Court to review the Fifth Circuit Court's opinion, and to stay the decision of the Court pending the outcome of the review. On June 10, 1974, the Supreme Court granted both requests.

Irrespective of this appeal, it is clear that the variance and enforcement order provisions of these states must be disapproved along with those of all other states. However, although the replacement regulations proposed below will apply to the six states within the Fifth Circuit

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<sup>2</sup> NRDC et. al. v. EPA (N. 72-2402, 5th Cir. February 8, 1974).



if the Supreme Court reverses the Fifth Circuit's decision, final Agency action on this matter must await the decision of the Supreme Court.

The replacement regulation proposed below requires that, except where a postponement has been granted pursuant to section 110(f) of the Act, no enforcement order, variance, or other state-initiated measure which defers compliance with a provision of the applicable plan shall be granted if it defers compliance beyond the applicable date for attainment of national standards specified in 40 CFR Part 52. Where a section 110(f) postponement has been granted for a given source, compliance for such source may be deferred only up to the expiration date of the section 110(f) postponement. Where a plan contains different dates for attainment of primary and secondary standards, a plan requirement necessary for attainment of primary standards may not be deferred beyond the primary standards attainment date and a plan requirement for attainment of secondary standards may not be deferred beyond the secondary standards attainment date. Finally, the regulation specifies that where the Administrator has extended the date for attainment of a primary standard beyond July 31, 1975, pursuant to section 110(e) of the Act, compliance with a plan requirement necessary for attainment of such primary standard may be deferred beyond July 31, 1975, only for the source or sources for which the

extension was granted, and only up to the expiration date of the section 110(e) extension.

\* \* \* \* \*

Dated: September 19, 1974.

JOHN QUARLES,  
*Acting Administrator.*

Part 52, Chapter I, Title 40 of the Code of Federal Regulations is proposed to be amended as follows:

1. In the following sections, paragraph (b) is added or revised as indicate<sup>d</sup> below:

- a. Subpart B—section 52.58 [added].
- b. Subpart C—section 52.94 [added].
- c. Subpart D—section 52.142 ([added].
- d. Subpart E—section 52.180 [added].
- e. Subpart F—section 52.268 [added].
- f. Subpart G—section 52.342 [added].
- g. Subpart H—section 52.378 [added].
- h. Subpart I—section 52.430 [added].
- i. Subpart J—section 52.498 [added].
- j. Subpart K—section 52.527 [added].
- k. Subpart L—section 52.579 [added].
- l. Subpart M—section 52.630 [added].
- m. Subpart N—section 52.681 [added].
- n. Subpart O—section 52.737 [added].
- o. Subpart P—section 52.791 [revised].
- p. Subpart Q—section 52.829 [revised].
- q. Subpart R—section 52.882 [added].
- r. Subpart S—section 52.930 [added].
- s. Subpart T—section 52.984 [added].
- t. Subpart U—section 52.1027 [added].
- u. Subpart V—section 52.1114 [added].
- v. Subpart W—section 52.1131 [revised].
- w. Subpart X—section 52.1179 [added].
- x. Subpart Y—section 52.1233 [added].
- y. Subpart Z—section 52.1278 [added].
- z. Subpart AA—section 52.1337 [added].
- a.a. Subpart BB—section 52.1380 [added].
- b.b. Subpart CC—section 52.1434 [added].

c.c. Subpart DD—section 52.1484 [added].  
 d.d. Subpart EE—section 52.1527 [added].  
 e.e. Subpart FF—section 52.1601 [added].  
 f.f. Subpart GG—section 52.1627 [added].  
 g.g. Subpart HH—section 52.1687 [added].  
 h.h. Subpart II—section 52.1776 [added].  
 i.i. Subpart JJ—section 52.1828 [added].  
 j.j. Subpart KK—section 52.1882 [added].  
 k.k. Subpart LL—section 52.1928 [added].  
 l.l. Subpart MM—section 52.1985 [added].  
 m.m. Subpart NN—section 52.2057 [added].  
 n.n. Subpart OO—section 52.2079 [revised].  
 o.o. Subpart PP—section 52.2130 [added].  
 p.p. Subpart QQ—section 52.2177 [added].  
 q.q. Subpart RR—section 52.2231 [added].  
 r.r. Subpart SS—section 52.2301 [added].  
 s.s. Subpart TT—section 52.2332 [added].  
 t.t. Subpart UU—section 52.2378 [added].  
 u.u. Subpart VV—section 52.2450 [added].  
 v.v. Subpart WW—section 52.2480 [added].  
 w.w. Subpart XX—section 52.2527 [added].  
 x.x. Subpart YY—section 52.5280 [added].  
 y.y. Subpart Z—section 52.2629 [added].  
 z.z. Subpart AAA—section 52.2675 [added].  
 a.a.a. Subpart BBB—section 52.2727 [added].  
 b.b.b. Subpart CCC—section 52.2777 [added].  
 c.c.c. Subpart DDD—section 52.2825 [added].

Paragraph (b) reads as follows:

\* \* \* \* \*

(b) *Regulation limiting variances.* No variance, enforcement order, or other state-initiated measure designed to defer compliance with a plan requirement which is necessary for attainment of a national standard shall be issued unless it specifically provides for consistency with the following requirements.

(1) Except as provided in paragraph (b) (2) of this section compliance may not be deferred beyond the applicable attainment date specified in Part 52 of this chapter. Where a plan contains different attainment dates for primary and secondary standards (i.e., specific

measures have been identified for attaining primary standards and additional measures have been identified for attaining secondary standards), the applicable attainment date for purposes of this paragraph shall be determined by whether a plan requirement being deferred is necessary for attainment of primary or secondary standards.

(2) Where the Governor of a state has requested, and the Administrator (under authority of section 110 (f) of the Clean Air Act) has approved a compliance date postponement for a given source, compliance may be deferred for such source only up to the expiration date of the section 110(f) postponement.

(3) Where the Administrator has extended the date for attainment of a primary standard beyond July 31, 1975, pursuant to section 110(e) of the Act, compliance with a plan requirement necessary for attainment of such primary standard may be deferred beyond July 31, 1975, only for the source or sources for which the extension was granted and only up to the expiration date of the section 110(e) extension.

\* \* \* \* \*

Calendar No. 1214

91ST CONGRESS }  
2d Session }

SENATE

{ REPORT  
{ No. 91-1196NATIONAL AIR QUALITY STANDARDS ACT  
OF 1970

SEPTEMBER 17, 1970.—Ordered to be printed

Mr. BYRD of West Virginia (for Mr. MUSKIE, from the  
Committee on Public Works, submitted the following

## REPORT

together with

INDIVIDUAL VIEWS  
[To accompany S. 4358]

The Committee on Public Works, to which the bill (S. 4358), to amend the Clean Air Act as amended, was referred having considered the same, reports favorably thereon without amendment. An original bill (S. 4358) is reported in lieu of S. 3229, S. 3466, and S. 3546 which were considered by the Committee.

## GENERAL STATEMENT

The committee bill would restructure the methods available to attack a critical and growing national problem of air pollution.

The legislation reported by the committee is the result of deep concern for protection of the health of the American people. Air pollution is not only an aesthetic nuisance. The Committee's concern with direct adverse effects upon public health has increased since the publication of air quality criteria documents for five major

pollutants (oxides of sulfur, particulates, carbon monoxide, hydrocarbons and oxidants). These documents indicate that the air pollution problem is more severe, more pervasive, and growing at a more rapid rate than was generally believed.

The new information that carbon monoxide concentrations at levels damaging to public health occur in Chicago more than 22 percent of the time, and that other cities have similar problems with carbon monoxide and other pollutants, intensified the committee's concern to authorize a massive attack on air pollution. This bill is designed to provide the basis for such an attack.

### NATIONAL AIR QUALITY STANDARDS AND GOALS

*Sec. 110. (a)(1) Within thirty days after the date of enactment of this section, the Secretary shall publish in the Federal Register, in accordance with section 553 of title 5 of the United States Code, proposed national ambient air quality standards for any air pollution agent or combination of such agents for which air quality criteria have been issued prior to the date of enactment of this section. He shall, after a reasonable time for interested persons to submit written comments thereon, promulgate such proposed national ambient air quality standards with such modifications as he deems appropriate. Such promulgation shall occur no later than ninety days after the initial publication of such proposed national ambient air quality standards.*

*(2) With respect to any air pollution agent or combination of such agents for which air quality criteria and information and control techniques are issued subsequent to enactment of this section, the Secretary shall publish, simultaneously with the issuance of such criteria and information, proposed national ambient air quality standards for any such pollution agent or combination of such agents. The procedure provided for in paragraph (1) of this subsection shall apply.*

*(3) National ambient air quality standards, proposed and promulgated to paragraphs (1) and (2) of this sub-*

section, shall be ambient air quality standards the attainment and maintenance of which are necessary to protect the health of persons. Such standards shall be revised, as necessary, in the same manner as promulgated.

(b) Simultaneously with the initial publication of proposed national ambient air quality standards pursuant to subsection (a) of this section, the Secretary shall publish proposed national ambient air quality goals the attainment and maintenance of which are necessary to protect the public health and welfare from any known or anticipated adverse effects associated with the presence of such air pollution agent or combination of such agents in the ambient air, including, but not limited to, adverse effects on soils, water, vegetation, manmade materials, animals, wildlife, weather, visibility, and climate, as well as effects on economic values. Such national ambient air quality goals shall be published and promulgated in the same manner as prescribed in subsection (a) of this section for proposed national ambient air quality standards. Such goals shall be revised as necessary, in the same manner as promulgated.

## IMPLEMENTATION PLANS

Sec. 111. (a)(1) After the promulgation of national ambient air quality standards and national ambient air quality goals, or revisions thereof under section 110 of this Act, for any air pollution agent or combination of such agents, each State shall, after reasonable notice and public hearings, adopt and submit to the Secretary, within nine months after such promulgation, a plan for implementation, maintenance, and enforcement of such standards and goals in each air quality control region designated or established pursuant to this Act. Unless a separate public hearing is provided, each State shall consider adoption of ambient air quality standards which are more restrictive than the national ambient air quality standards at the hearing required by this paragraph.

(2) The Secretary shall, within four months after the date required for such submission, act to approve or to disapprove such plan or portion thereof. The Secretary

shall approve such plan, or any portion thereof, if he determines that it—

(A) provides for the attainment of such national ambient air quality standards within three years from the date of approval of such plan;

(B) includes emission requirements, schedules and timetables of compliance, and such other measures as necessary to insure attainment of any applicable ambient air quality standard and goal;

(C) includes provision for establishment and operation of appropriate devices, methods, systems, and procedures necessary to (i) monitor, compile, and analyze data on ambient air quality and, (ii) upon request, make such data available to the Secretary;

(D) includes, to the extent necessary, appropriate procedures, including, but not limited to, land-use and air and surface transportation controls and permits, for insuring that any source of air pollution agents or combination of such agents will be located, operated, and for other than moving sources, designed, constructed, and equipped in such a way that such sources will not interfere with implementation, maintenance, and enforcement of any applicable air quality standard and goal;

(E) contains adequate provisions for intergovernmental co-operation, including measures necessary to insure that emissions of such agents or combination of such agents from sources located in one air quality control region will not cause or contribute to a violation of such air quality standards or prevent attainment of such air quality goals in any other air quality control region or portion thereof;

(F) provides (i) that any person who owns, leases, operates, or controls any stationary source subject to the provisions and requirements of such implementation plan shall be required to furnish to the appropriate State agency periodic reports on the nature and amounts of emissions of any air pollution agent or combinations of such agents from such source, and (ii) that such reports shall be correlated by the State agency with any emission requirements



or standards established pursuant to this Act which reports shall be part of the public record and available at reasonable times for public inspection;

(G) provides necessary assurances that the State will have adequate personnel, funding, and authority to carry out such implementation plan, including requirements for installation of monitoring equipment and methods on sources subject to emission requirements; periodic reporting on the nature and amounts of emissions; and authority comparable to that in section 303 of this Act, and contingency plans to implement such authority as determined by the Secretary;

(H) provides, to the extent necessary, for a program of periodic inspection and testing of motor vehicles, as authorized by section 208 of this Act;

(I) provides for revision, after public hearings, of such plan from time to time as may be necessary to take account of revisions of such ambient air quality standards and goals or availability of improved or more expeditious methods of achieving such standards and goals; and

(J) identifies the air quality control region to which such plan applies including the boundaries of such region if it is one resulting from a subdivision under section 108(a) of this Act.

(3) Each approved plan, or portion thereof, for implementation, maintenance, and enforcement of such standards and goals shall be the implementation plan applicable to such air quality control region.

(b) The Secretary may, wherever he determines necessary, extend the period for submission of any portion of any plan for implementation of any national ambient air quality goal, for a period not to exceed eighteen months from the date otherwise required for submission of such plan.

(c) The Secretary shall, after consideration of any State hearing record promptly prepare and publish proposed regulations setting forth such as plan, or portion thereof, for such quality air control region if (1) a

State fails to submit, for any air quality control region, or portion thereof, a plan for implementation, maintenance, and enforcement of ambient air quality standards and goals within the time prescribed, or (2) the plan, or portion thereof, submitted for any such region is determined by the Secretary not to be in accordance with the requirements of this section. If such State held no public hearing associated with adoption of an implementation plan, the Secretary shall provide opportunity for such hearing within such region on any proposed regulation for such region. The Secretary shall, within six months after the date required for submission of such plans, promulgate any such regulations unless, prior to such promulgation, the subject State has adopted and submitted a plan which the Secretary determines to be in accordance with the requirements of this section. A plan promulgated by the Secretary for any air quality control region shall be the plan applicable to such region in the same manner as if such plan had been adopted by the subject State and approved by the Secretary pursuant to subsection (a) of this section and shall remain in effect until such State submits a plan and it is approved under this section.

(d) Ambient air quality standards and implementation plans adopted by States and submitted to the Secretary pursuant to this Act prior to enactment of this section shall remain in effect, unless the Secretary determines that such air quality standards and implementation plans, or portions thereof, are not consistent with the applicable requirements of this Act and will not provide for the attainment of national ambient air quality standards in the time required by this Act. If the Secretary so determines, he shall, within ninety days after promulgation of any national ambient air quality standards pursuant to section 110(a)(1) of this Act, notify the appropriate State or States and specify in what respects changes are needed to meet the additional requirements of this Act, including requirements to implement ambient air quality goals. If such changes are not adopted by the State, or States after public hearings and within six months after such notification, the Secretary shall

promulgate such changes pursuant to subsection (c) of this section.

(e)(1) Whenever, the Secretary or his authorized representative finds new information developed from surveys, studies, investigation, or reports, or any information otherwise made available to him, that, in any air quality control region, an approved or promulgated implementation plan will be, or has been, substantially inadequate to achieve national ambient air quality standards promulgated pursuant to this Act, the Secretary shall notify the appropriate State or States of such new information and shall allow the appropriate State or States an opportunity to respond. If such State or States fails to respond within ninety days after receipt of such notice, or if such response is inadequate, the Secretary shall revise and promulgate such plan within four months, in accordance with provisions of section 553 of title 5 of the United States Code. Such revision may include an extension of the period required to obtain the quality of air established by any national ambient air quality standard established pursuant to this Act, except that such extension shall not exceed one year. No further extension shall be granted pursuant to this provision and no extension shall affect any emission requirement, timetable, or schedule of compliance adopted as a part of the plan subject to revision unless such requirement, timetable, or schedule is the subject of such revision.

(2) Any revised plan promulgated pursuant to this subsection shall be the plan applicable to such region in the same manner as if such plan had been adopted by the State and approved by the Secretary pursuant to this section.

(f)(1) No later than one year before the expiration of the period for the attainment of ambient air of the quality established for any national ambient air quality standard pursuant to section 110 of this Act, the Governor of a State in which is located all or part of an air quality control region designated or established pursuant to this Act may file a petition in the district court of the United States for the district in which all or a part of such air quality control region is located against the

United States for relief from the effect of such expiration (A) on such region or portion thereof, or (B) on a person or persons in such air quality control region. In the event that such region is an interstate air quality control region or portion thereof, any Governor of any State which is wholly or partially included in such interstate region shall be permitted to intervene for the presentation of evidence and argument on the question of such relief.

(2) Any action brought pursuant to this subsection shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28 of the United States Code and appeal shall be to the Supreme Court. Proceedings before the three judge court, as authorized by this subsection, shall take precedence on the docket over all other causes of action and shall be assigned for hearing and decision at the earliest practicable date and expedited in every way.

(3)(A) In any such proceeding the Secretary shall intervene for the purpose of presenting evidence and argument on the question of whether relief should be granted.

(B) The court, in its discretion, may permit any interested person residing in any affected State to intervene for the presentation of evidence and argument on the question of relief.

(4) The court, in view of the paramount interest of the United States in achieving ambient air quality necessary to protect the health of persons shall grant relief only if it determines such relief is essential to the public interest and the general welfare of the persons in such region, after finding—

(A) that substantial efforts have been made to protect the health of persons in such region; and

(B) that means to control emissions causing or contributing to such failure are not available or have not been available for a sufficient period to achieve compliance prior to the expiration of the period to attain an applicable standard; or

(C) that the failure to achieve such ambient air quality standard is caused by emissions from a Fed-

*eral facility for which the President has granted an exemption pursuant to section 119 of this Act.*

*(5) The court, in granting such relief shall not extend the period established by this Act for more than one year and may grant renewals for additional one year periods only after the filing of a new petition with the court.*

*(6) The Secretary, in consultation with any affected State or States, shall take such action as may be necessary to modify any implementation plan or formulate any new implementation plan for the period of such extension.*

*(7) No extension granted pursuant to this section shall effect compliance with any emission requirement, timetable, schedule of compliance, or other element of any implementation plan unless such requirement, timetable, schedule of compliance, or other element of such plan is the subject of the specific order extending the time for compliance with such national ambient air quality standard.*

SUPREME COURT OF THE UNITED STATES

No. 73-1742

RUSSELL E. TRAIN, Administrator, United States  
Environmental Protection Agency, ET AL.,  
PETITIONERS

*v.*

NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL.

ORDER ALLOWING CERTIORARI—Filed October 15, 1974

The petition herein for a writ of certiorari to the  
United States Court of Appeals for the Fifth Circuit is  
granted.

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**In the Supreme Court of the United States**

OCTOBER TERM, 1973

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No.

RUSSELL E. TRAIN, ADMINISTRATOR,  
UNITED STATES ENVIRONMENTAL PROTECTION  
AGENCY, and the UNITED STATES ENVIRONMENTAL  
PROTECTION AGENCY, PETITIONERS

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL.

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PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR  
THE FIFTH CIRCUIT

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The Solicitor General, on behalf of the Administrator of the Environmental Protection Agency, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

**OPINION BELOW**

[The opinion of the court of appeals (App. A, *infra*, pp. 1a-52a) is reported at 489 F.2d 390.

## JURISDICTION

The judgment of the court of appeals was entered on February 8, 1974 (App. B, *infra*, pp. 53a-54a). On May 8, 1974, Mr. Justice Powell extended the time for filing a petition for a writ of certiorari to and including May 23, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTION PRESENTED

Whether the Environmental Protection Agency must disapprove provisions of state implementation plans under the Clean Air Act which authorize the states to grant interim variances from the state plan under the revision authority of Section 110(a) (3) of the Act, prior to the effective date of the Act's mandatory deadlines.

## STATUTE INVOLVED

The Clean Air Amendments of 1970, 84 Stat. 1676, 42 U.S.C. 1857, *et seq.*, are set forth in relevant part in Appendix C, *infra*, pp. 55a-64a.

## STATEMENT

This case is an action to review the approval by the Environmental Protection Agency of the Georgia state plan for achieving the national ambient air quality standards required by the Clean Air Act Amendments of 1970. It involves the power of States to grant variances from their implementation plans prior to the statutory deadlines for attainment of the national primary standards—generally mid-1975.

1. Section 110 of the Clean Air Act, as amended, 42 U.S.C. 1857c-5, requires each State, after notice and public hearings, to adopt and submit to the Environmental Protection Agency a plan for the implementation, maintenance and enforcement of the national primary and secondary ambient air quality standards<sup>1</sup> in each air quality control region in that State.

Under Section 110(a)(2)(A), 42 U.S.C. 1857c-5(a)(2)(A), the national primary standards must be achieved "as expeditiously as practicable but [unless an extension of up to two years is granted under Section 110(e), 42 U.S.C. 1857c-5(e)] in no case later than three years from the date of approval of such plan." This three-year statutory deadline is generally in mid-1975, unless an extension under Section 110(e) has been granted.<sup>2</sup>

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<sup>1</sup> National primary ambient air quality standards are those "requisite to protect the public health," while the national secondary ambient air quality standards are those "requisite to protect the public welfare from any known or anticipated adverse effects associated with the presence of such air pollutant in the ambient air." Section 109(b), 42 U.S.C. 1857c-4(b).

<sup>2</sup> The mandatory compliance dates for the States of the Fifth Circuit are:

*Alabama*: July 1975 for all national standards except: carbon monoxide in the Metropolitan Birmingham Intrastate Region, May 31, 1975; photochemical oxidant (hydrocarbons) in the Mobile—Pensacola—Panama City—Southern Mississippi Interstate Region, May 31, 1975, and photochemical oxidants (hydrocarbons) in the Metropolitan Birmingham Intrastate Region, May 31, 1977 (40 C.F.R. 52.54).

[Footnote continued on page 4]

The Administrator, on May 31, 1972, disapproved portions of the Georgia Plan and approved the rest of the Plan. 37 Fed. Reg. 10842, 10859-10860. The Natural Resources Defense Council, Inc., and others sought direct review in the Court of Appeals for the Fifth Circuit of the Administrator's approval of parts of the implementation plan for the State of Georgia, as authorized by Section 307(b)(1) of the Clean Air Act, 42 U.S.C. 1857h-5(b)(1). The court of appeals held in part that the Administrator's approval of the Georgia Plan violated the Clean Air Act because the Plan authorizes the State to grant variances from the Plan's requirements without com-

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<sup>2</sup> [Continued]

*Florida:* July 1975 for all national standards (40 C.F.R. 52.523).

*Georgia:* July 1975 for all national standards (40 C.F.R. 52.575).

*Louisiana:* July 1975 for all national standards except for photochemical oxidants (hydrocarbons) in the Southern Louisiana, Southeast Texas Interstate Region, May 31, 1975 (40 C.F.R. 52.979).

*Mississippi:* June 1975 for all national standards (40 C.F.R. 52.1273).

*Texas:* July 1975 for all national standards, except for photochemical oxidants (hydrocarbons) in the following regions: Austin—Waco Intrastate, May 31, 1975; Corpus Christi—Victoria Intrastate, May 31, 1975; Metropolitan Houston—Galveston Intrastate, May 31, 1977; Metropolitan Dallas—Fort Worth Intrastate, June 30, 1976; Metropolitan San Antonio Intrastate, May 31, 1977; Southern Louisiana—Southeast Texas Interstate, May 31, 1975; El Paso—Las Cruces—Alamogordo Interstate, May 31, 1975 (40 C.F.R. 52.2279 as amended November 6, 1973, 38 Fed. Reg. 30642).

plying with the postponement provisions of Section 110(f) of the Act.

2. This case comes to the Court in the following context. When the Environmental Protection Agency promulgated its guidelines for the preparation of state implementation plans, it took the position, in what is now 40 C.F.R. 51.32(f), that the provisions of Section 110(f) of the Act do not apply to all exceptions, but only to those that would affect the ability of the state to achieve the national primary standards "as expeditiously as practicable" and the secondary standards "within a reasonable time" (Section 110(a) (2)(A)) or to remain in compliance with those standards once they had been achieved. Variances that would not have such an effect were to be treated not as requests for exceptions under Section 110(f) but as applications for revisions of the plan under Section 110(a)(3) of the Act and were to satisfy the requirements of that Section rather than Section 110(f).<sup>3</sup> The states acted in reliance upon this interpretation of the Act in preparing their implementation plans.

As a practical matter, the authority granted by this construction of the Act is particularly important prior to the effective date of the national standards, since it is in the early years of the program that sources are likely to have reasonable grounds for asserting that they are unable to comply immediately with the standards. Many states, relying on the con-

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<sup>3</sup> The significance of the difference between these two procedures is explained *infra* at pp. 9-10.

tinuing power to grant variances, adopted implementation plans with emission standards having immediately effective dates as to all sources. Then, as to sources that could not feasibly be brought into compliance immediately, variances were granted subject to compliance schedules that would bring those sources into compliance with the national standards "as expeditiously as practicable." These states intended to defer the applicability of their immediately effective regulations in individual cases only where necessary, by placing sources on expeditious but reasonable compliance schedules as a condition of granting variances. The advantage of this early compliance date approach is that it makes all sources aware that, without such a variance, they are subject to presently effective legal standards, rather than just to the threat of such standards at a future date. The implementation plans of the Fifth Circuit States of Alabama, Georgia, Mississippi, Louisiana and Texas<sup>4</sup> followed this approach. Other states (only Florida in the Fifth Circuit)<sup>5</sup> made their emission regulations effective at the latest possible date allowed by the Clean Air Act—generally mid-1975. Such states have no need to grant variances prior to the effective date of their implementation plans.

The National Resources Defense Council filed actions in several courts of appeals challenging the Agency's approval of state implementation plans on the ground, among others, that the procedures of

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<sup>4</sup> The Texas compliance date is December 31, 1973.

<sup>5</sup> The Florida compliance date is July 1975.

Section 110(f) apply to any action by a state at any time relieving any source from the requirements of the state's own plan. As will be developed further below, the Council relied on the literal language of Section 110(f) while the Administrator relied on the language of Section 110(a)(3), the structure and purpose of the statute and the legislative history. The first case to be decided on this point was decided by the Court of Appeals for the First Circuit on May 2, 1973. *National Resources Defense Council v. Environmental Protection Agency*, 478 F.2d 875. That court determined that, given the structure of the congressional plan, it was necessary to distinguish between the pre-deadline and post-deadline periods. During the post-deadline period, that court held, permitting variances without following the formal procedures of Section 110(f) would be contrary to the congressional scheme. But as to the pre-deadline period the First Circuit held that variance authority is consistent with the statute. Although this solomonesque construction requires creative reading of the statute's literal language, it is a reasonable and workable solution to the complex ambiguities of the Act. Upon review of this decision, the Administrator and the Solicitor General determined not to seek Supreme Court review, and the Agency is conforming its regulations and procedures to this construction of the statute.

This construction was subsequently followed by the Eighth Circuit, *National Resources Defense Council v. Environmental Protection Agency*, 483 F.2d 690,



693-694. In the present case, however, the Fifth Circuit rejected the First Circuit's construction of the Act, the construction now adopted by the Agency, and held that Section 110(f) provides the exclusive procedure by which a state may authorize variances from its implementation plan. Thereafter, the Second Circuit also adopted the approach of the First and Eighth Circuits, and specifically rejected the approach of the Fifth Circuit in the present case. *National Resources Defense Council v. United States Environmental Protection Agency*, Nos. 72-1728 and 72-2165, decided March 13, 1974.

#### REASONS FOR GRANTING THE WRIT

1. The decision of the court below would disrupt the orderly administration of the Clean Air Act and the economies of those states in the Fifth Circuit that, in reasonable reliance on their power to grant variances, adopted implementation plans with early effective compliance dates. Indeed, if the stay motion which accompanies this petition is not granted, the Administrator will be unable to approve some 1,400 variances now noticed in the Federal Register for approval or disapproval.<sup>6</sup> If this happens, continued emissions by those sources will be illegal until such time as the states and the Agency have been able to reprocess these applications in conformity

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<sup>6</sup> These variances were submitted by the States of Mississippi and Alabama. An additional 600 variances from these states are ready for notice-publication. As of May 15, 1974, another 800 variances are expected from Georgia, 200 from Louisiana and 21 from Texas for major sources.

with Section 110(f). Neither the states nor the Agency are in a position to do this on an expeditious basis.

Under Section 110(f), a postponement may be requested only by the governor of a state, and only for one year. The Section 110(f) postponement procedures would, if applicable, require EPA to hold an adjudicatory-type hearing, after notice to interested parties, before approving a state-requested variance. The EPA could approve the postponement only if the Administrator had determined, on the basis of the entire record with a formal statement of his findings and conclusions, that:

(A) good faith efforts have been made to comply with such requirement before such date,

(B) such source (or class) is unable to comply with such requirement because the necessary technology or other alternative methods of control are not available or have not been available for a sufficient period of time,

(C) any available alternative operating procedures and interim control measures have reduced or will reduce the impact of such source on public health, and

(D) the continued operation of such source is essential to national security or to the public health or welfare,

then the Administrator shall grant a postponement of such requirement.

In contrast, under Section 110(a)(3), the Agency need only publish the proposed variance in the Fed-

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<sup>7</sup> Section 110(f) is reproduced in full at App. C, *infra*, pp. 62a-64a.

eral Register, receive public comments, and determine that the variance is consistent with the requirements applicable to the original plan, *i.e.*, the requirements of Section 110(a)(2).

2. As previously noted (pp. 7-8. *supra*) the decision below is in conflict with decisions of the First, Second, and Eighth Circuits. Not only does the construction of the Act adopted by the Fifth Circuit discriminate against states which adopted implementation plans with early compliance dates, an environmentally sound approach favored by the Agency, but this conflict in the circuits means that only such states located in the Fifth Circuit (and, particularly, industries located in those states) would be subject to this discriminatory construction. Although the issue relates only to the time period prior to the mandatory attainment dates for the national ambient standards, generally mid-1975 but in some instances as late as mid-1977, it is an issue vital to the scheme of the Act for achieving an orderly transition from pre-attainment to post-attainment requirements, and an issue of significant economic importance to the states adversely affected.

3. The decision below is in error. The First Circuit, in arriving at its construction of the Act, was impressed by the anomaly of requiring States to use the Section 110(f) procedure prior to the congressionally imposed mandatory deadline, since Section 110(f) permits a maximum postponement of only one year, while the statute envisages that expeditious progress may take as long as five years. For states

with immediately effective plans, the possibility of a five-year grace period would thus become illusory. The First Circuit stated (478 F.2d at 887):

The provision for a three-year grace period, followed by the possibility of a further two-year extension, indicates that Congress did not expect immediate achievement of standards. A state plan must provide for attainment of primary standards "as expeditiously as practicable but \* \* \* in no case later than three years from the date of approval \* \* \*", and of secondary standards "within a reasonable time" as stated in the plan. § 1857c-5(a)(2)(A).

A state plan may well establish emission limitations or other requirements during the preliminary period which one or more sources simply cannot initially meet. A postponement under § 1857c-5(f), besides being limited to only one year, would require meeting a stricter standard than is suggested by the "as expeditiously as practicable" language. § 1857c-5(a)(2)(A). We can see value in permitting a state to impose strict emission limitations now, subject to individual exemptions if practicability warrants; otherwise it may be forced to adopt less stringent limitations in order to accommodate those who, notwithstanding reasonable efforts, are as yet unable to comply.

The Administrator sees his power to allow such exemption procedures as deriving from the "revision" authority in § 1857c-5(a)(3). We tend to view it more as a necessary adjunct to the statutory scheme, which anticipates greater flexibility during the pre-attainment period. We

do not doubt the Administrator's power to approve reasonable mechanisms for state and local deferrals of control strategy, provided they cease before the mandatory compliance date and the individual variances are not granted without his specific approval.

The court below rejected the First Circuit's holding on this variance issue and held that the States must petition EPA for a postponement, following the cumbersome machinery of Section 110(f), for all variances, deferrals or postponements, whether before or after the mandatory date of compliance with the Clean Air Act. The court below stated (App. A, *infra*, pp. 25a-26a) :

We are unable to agree that the statute envisions granting the states the kind of "flexibility" during the "pre-attainment period" which provisions like Georgia's section 88-912 would afford. The parts of the statute on which the First Circuit relied were the provision of section 1857c-5(a)(2)(A)(i) that primary standards had to be met, not immediately, but only "as expeditiously as practicable", but in no case later than three years from the adoption of the state plan, and the provision of section 1857c-5(e) for a possible two-year extension of the deadline in sharply restricted circumstances. The First Circuit said that "[t]he provision for a three-year grace period, followed by the possibility of a further two-year extension, indicates that Congress did not expect immediate achievement of *standards*." 478 F.2d at 887 (emphasis supplied).

This statement, however, contains a crucial ambiguity, and it supports the First Circuit's holding only if that ambiguity is overlooked. It is of course true that the provision of a three-year grace period, and of the possibility, however limited, of an extension, do mean that Congress did not expect immediate achievement of *ambient* standards. But it does *not* follow that Congress did not contemplate that *emission* standards would not have to be met "immediately" as their schedule dates—set by the implementation plan—arrived. We think that the provisions of section 1857c-5(a)(2)(A)(i) and section 1857c-5(e) do not provide *any* support for the later conclusion. Nor do we find any support for that conclusion anywhere in the statute. Instead we find that the statute as a whole supports the general view of its overall strategy we articulated above; that the plan of the statute was to secure ambitious commitments at the planning stage, and then, by making it difficult to depart from those commitments, to assure that departures would be made only in cases of real need. That view precludes the conclusion that Congress intended the states to have the kind of "flexibility" state variance plans would give them.

Significantly, however, the "ambitious commitments" which were in fact obtained in the implementation plans of Georgia and other states were obtained in part because of the existence of variance authority which made those commitments feasible during the transition stage. By leaving Georgia with its commitments but striking from the plan the mechanism which made those commitments feasible,

the decision below would disrupt the orderly working of the congressional scheme.

The opinion below ignores the only relevant legislative history. When Senator Muskie presented the Conference Report, he read into the record a Summary of the Provisions of Conference Agreement on the Clean Air Amendments of 1970. This Summary, in discussing Section 110 of the Act, briefly described the provision of Section 110(e), which permits the governor of a State, when the State's implementation plan is submitted, to request a two-year extension of the mandatory deadline. The Summary's description of Section 110(e) shows that the statutory mention of "the deadline" referred to the mandatory three-year deadline. The Summary stated (116 Cong. Rec. 42384) :

If, at the time of plan approval, it appears impossible to bring specific sources into compliance within three years, the Governor of the State may request an extension of the deadline up to two years. The Administrator must be satisfied that alternate means of achieving the standard have been considered (including closing down the source in question), that all reasonable interim measures will be applied, and that the State is justified in seeking the extension.

Immediately thereafter the Summary briefly discussed the provisions of Section 110(f), the postponement provision at issue here. The Summary's description of Section 110(f) stated (116 Cong. Rec. 42384-42385) :

A Governor may also apply for a postponement of the deadline if, when the deadline approaches,

it is impossible for a source to meet a requirement under an implementation plan, interim control measures have reduced (or will reduce) the adverse health effects of the source, and the continued operation of the source is essential to national security or the public health or welfare of that State. Such a postponement is subject to judicial review.

In context, it is clear that this "deadline" is the mandatory three-year deadline just discussed in the preceding paragraph.

Thus, in the only relevant legislative history, Congress revealed its intention to require states to employ the complex Section 110(f) postponement procedure only when the mandatory three-year deadline would be affected, not for every delay or deferral of state-imposed requirements which does not affect the achievement of the standards within the statutory time requirements.

The opinion below narrowly focuses on the language of Section 110(f), which speaks of postponement of the date of compliance "with any requirement" of a state plan. Taken out of context, this language supports the court's holding. The Environmental Protection Agency, however, was authorized by Congress, under Section 110(a)(3), 42 U.S.C. 1857c-5(a)(3), to approve "any revision" of an implementation plan which meets the same requirements that obtain for approval of original implementation plans, that is, the requirements of Section 110(a)(2). EPA has accordingly considered a deferral of a date of compli-



ance (a variance), prior to the statutory date of attaining the primary standards, to be a revision of the state plan which it is authorized to approve under Section 110(a)(3), 40 C.F.R. 51.6, 51.32(f).

Relying on its authority under Section 110(a)(3), 42 U.S.C. 1857c-5(a)(3), and the construction of the statute by the First Circuit, EPA has adopted a reasonable interpretation of the Clean Air Act whereby it will review and, if acceptable, approve state variances conditioned upon compliance schedules meeting the requirements of Section 110(a)(2) prior to the statutory deadline. Thus, EPA will not approve a variance unless it is convinced that, in addition to requiring compliance prior to the statutory deadline, the terms of the compliance schedule accompanying the variance reflect the most expeditious progress practicable toward achievement of the national primary standards and achievement of the secondary standards within a reasonable time. This reasonable construction of the Act has been adopted by the agency primarily responsible for its enforcement and by the three courts of appeals other than the court below which have passed on the question and should, in fairness, be applied uniformly throughout the Nation.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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MAY 1974.

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APPENDIX A

UNITED STATES COURT OF APPEALS  
FIFTH CIRCUIT

No. 72-2402

NATURAL RESOURCES DEFENSE COUNCIL, INC., Project  
on Clean Air, Save America's Vital Environment,  
Inc., Janey Weber and Susanne Allstrom,  
PETITIONERS,

v.

ENVIRONMENTAL PROTECTION AGENCY,  
RESPONDENT.

Feb. 8, 1974

Before WISDOM, DYER and INGRAHAM, Circuit  
Judges.

WISDOM, Circuit Judge:

The petitioners in this case are two non-profit corporations, Natural Resources Defense Council (NRDC) and Save America's Vital Environment (SAVE), and two individual citizens. They seek review of an order of the Administrator of the Environmental Protection Agency (EPA), approving the State of Georgia's plan for achieving the federal ambient air quality standards under the Clean Air Act Amendments of 1970.<sup>1</sup> Petitioners raise four objec-

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<sup>1</sup> 42 U.S.C. §§ 1857-58a (1970). The Clean Air Act was originally enacted in 1963, Pub.L. No. 88-206, 77 Stat. 392,

tions to the Administrator's action on the Georgia Plan. These concern (1) a provision of that Plan guaranteeing the confidentiality of secret trade information supplied to Georgia pollution control officials; (2) a provision allowing Georgia officials to grant variances from particular requirements of the Plan; (3) Georgia's adoption of a "control strategy" allowing "sources" of sulfur dioxide and particulate matter emissions, e. g. manufacturing plants, to avoid the necessity of installing emission reduction equipment by increasing the height of their smokestacks; and (4) provisions of the Plan directing Georgia officials to take into account economic impact and technological feasibility in the discharge of their duties under the state's air pollution control statutes. We conclude that in approving each of the challenged provisions of the Georgia Plan, the Administrator exceeded his authority under the Clean Air Act Amendments, and order him to take appropriate corrective action.

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and amended in relatively minor ways three times during the following seven years. Its present form, however, derives almost entirely from the amendments adopted in 1970. Clean Air Act Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676. Throughout the opinion, we use the "Act" and the "Amendments" interchangeably.

The petitioners challenge an order made by the Administrator under 42 U.S.C. § 1857c-5(a)(2). Jurisdiction in this court is conferred by 42 U.S.C. § 1857h-5(b)(1), which confers jurisdiction on the appropriate circuit courts of appeals to hear petitions for review of orders of the Administrator approving state implementation plans under section 1857c-5(a)(2). See note 19 *infra*.

We begin with a necessary discussion of the provisions of the Clean Air Act Amendments of 1970 relevant to the issues in this case.

## I.

The Clean Air Act Amendments of 1970 establish a program for controlling air pollution that involves two phases of standard-setting. The first phase is the setting of what the Amendments call "ambient air quality standards". These are standards designating the maximum tolerable concentrations in the ambient air of substances identifiable as pollutants. The second is the establishment of specific controls enforceable against individual sources of emissions, designed to limit the permissible quantities of matter emitted into the air, or to control the timing, rate, or manner of emissions.<sup>2</sup> The changes in the ambient

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<sup>2</sup> For our purposes in addressing the issues in this case, in particular the third objection raised by the petitioners, it is necessary to explain three terms used to define different categories of the kinds of "enforceable controls" which may be employed to effect attainment of ambient air standards. The first, "emission standards", refers to standards setting specific quantitative limits on the amounts given individual sources may emit into the air. The second, "emission limitations", is an inclusive term referring to any type of control to reduce the amount of emissions into the air. This includes, of course, "emission standards", but it also includes a number of regulatory devices. These range from regulations directing sources of emissions to cease or curtail operations to regulations specifying limits on the sulfur content of fuel that fuel-burning emission sources may burn; "transportation controls" designed to reduce the use of motor vehicles, either through the development of mass transit systems, or through

levels of pollutant concentrations by these various enforceable controls are calculated largely through a technique known as diffusion modeling.<sup>3</sup> In this way,

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traffic control devices, commuter taxes, gasoline rationing, or parking restrictions; and the imposition of emission charges or other economic incentives aimed at inducing parties to reduce their emissions voluntarily. Both the terms "emission limitations" and "emission standards" are used at various points throughout the 1970 Amendments. See, e.g., 42 U.S.C. §§ 1857c-6(a)(1), 1857c-6(d)(1), 1857c-7(b)(1), 1857h-2(a)(1), 1857c-5(a)(2)(B). See part IV-B *infra*.

The third term is "dispersion enhancement techniques". Dispersion enhancement techniques are devices which seek to reduce concentrations of pollutants not by reducing the amounts of pollutants emitted into the air, but rather by increasing the dispersion of pollutants throughout the atmosphere, so that pollutants are dispersed away from high-concentration areas and toward lower concentration areas. "Dispersion enhancement" techniques and "emission limitation" techniques thus constitute mutually exclusive categories. There are two major types of dispersion enhancement techniques. One, "intermittent" or "supplementary" control systems, involves staggering the hours of operation at industrial facilities which are major sources of pollution, so that the industries operate most extensively when meteorological conditions are favorable to dispersion, and curtail, or sometimes cease, operations when meteorological conditions do not favor dispersion. Another, at issue in this suit, involves the construction of high smokestacks at emission sources. The theory is that the higher the altitude at which pollutants are emitted, the more widely dispersed they will be.

On the range of "control strategies" that may be used in attaining the ambient standards, see Guidelines for the Preparation, Adoption and Submittal of Implementations Plans. 40 C.F.R. § 51.1(n) (1972).

<sup>3</sup> See generally S.Doc.No.91-63, at 100-03 (1970); Hearings Before the Subcomm. on Air and Water Pollution of the Senate Comm. on Public Works on the Implementation of the

the emission standards and other "second phase" controls are derived from the ambient standards.

The Amendments divide responsibility for the establishment of these two sets of standards between the states and the federal government. The EPA has exclusive responsibility for establishing national ambient standards, while the states have primary authority, subject to EPA review, for establishing their own "implementation plans" to achieve those standards. The federal authority for promulgating ambient standards is established by 42 U.S.C. § 1857c-4 (a). That provision requires the Administrator of the EPA to promulgate ambient air quality standards for all so-called "criteria pollutants" within 120 days from the enactment of the Amendments.<sup>4</sup> The Administrator is to establish two sets of ambient standards for each pollutant: "primary" standards,

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Clean Air Act Amendments of 1970, 92d Cong., 2d Sess., pt. 1 at 717 (1972); Note, The Clean Air Act Amendments of 1970: A Congressional Cosmetic, 61 Geo.L.J. 153, 160-61 (1972).

<sup>4</sup> "Criteria pollutants" are so called because they are pollutants for which the Administrator has issued "air quality criteria"—information about the extent and nature of the deleterious effects of the pollutant—under 42 U.S.C. § 1857c-3. Criteria pollutants are defined as those substances "ha[ving] an adverse effect on public welfare" and whose "presence . . . in the ambient air results from numerous or diverse mobile or stationary sources". *Id.* § 1857c-3(a) (1).

At present, there are six categories of "criteria pollutants": sulfur oxides; carbon monoxide; nitrogen dioxide; the hydrocarbons; particulate matter; and the photochemical oxidants. See 40 C.F.R. § 50 (1972).



"the attainment and maintenance of which . . . are requisite to protect the public health", 42 U.S.C. § 1857c-4(b)(1); and "secondary" standards "requisite to protect the public welfare from any known or anticipated adverse effects".<sup>5</sup> 42 U.S.C. § 1857c-4(b)(2).

The provision governing the adoption by the states and approval by the EPA of the state implementation plans is 42 U.S.C. § 1857c-5; and this long and detailed provision is the focus of our concern in this case. Under § 1857c-5, the states must prepare and submit implementation plans within nine months of the promulgation of the national ambient standards.<sup>6</sup> The Administrator then reviews the state plans to assure that they meet requirements established by the statute. The basic requirements are that the plans guarantee (1) the attainment of the national primary standards "as expeditiously as practicable", but in no case later than three years after the date of the approval of the plan,<sup>7</sup> and (2) the attainment

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<sup>5</sup> Language in a definitional provision of the statute explains the meaning of "effects on public welfare":

All language referring to effects on public welfare includes, but is not limited to, effects on soils, water, crops, vegetation, manmade materials, animals, wildlife, weather, visibility, and climate, damage to and deterioration of property, and hazards to transportation, as well as effects on economic values and on personal comfort and well-being.

42 U.S.C. § 1857h(h).

<sup>6</sup> *Id.* § 1857c-5(a)(1).

<sup>7</sup> *Id.* § 1857c-5(a)(2)(A)(i).



of the secondary standards within a "reasonable time" to be specified by each plan.<sup>8</sup> Each plan must include "emission limitations, schedules, timetables for compliance with the limitations, and such other measures as may be necessary to insure attainment and maintenance" of the national standards.<sup>9</sup> Beyond these basic requirements, the provisions of § 1857c-5(a)(2)(C)-(H) set forth a number of other specific conditions a plan must meet before the Administrator may approve it. For instance, the plan must provide for monitoring and analyzing data on ambient air quality;<sup>10</sup> it must assure the funding and staffing of state agencies responsible for carrying out the plan;<sup>11</sup> and it must provide for periodic reports on the nature and quantity of emissions, and for making such reports public.<sup>12</sup> If the Administrator finds that a plan meets all of the statutory conditions, he must approve the plan within four months of the date of its submission.<sup>13</sup> If, on the other hand, he finds a plan or any portion of a plan does not satisfy any of the statutory conditions, he must disapprove that plan or portion. He is then directed to prepare and publish "promptly" his own implementation plan, or portion of a plan, for the state involved.<sup>14</sup> The Administrator must publish his substitute regulations within six

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<sup>8</sup> *Id.* § 1857c-5(a)(2)(A)(ii).

<sup>9</sup> *Id.* § 1857c-5(a)(2)(B).

<sup>10</sup> *Id.* § 1857c-5(a)(2)(C)(i).

<sup>11</sup> *Id.* § 1857c-5(a)(2)(F)(i).

<sup>12</sup> *Id.* § 1857c-5(a)(2)(F)(iii)-(iv).

<sup>13</sup> *Id.* § 1857c-5(a)(2).

<sup>14</sup> *Id.* § 1857c-5(c).

months of the date required for submission of the implementation plan in question.<sup>15</sup>

Subsections (e) and (f) of section 1857c-5 allow the Administrator to relax, in sharply limited circumstances, the requirements of section 1857c-5 or of any implementation plan promulgated under it. Subsection (e) allows the Administrator to extend the three-year deadline for meeting the national primary standards for up to two years, at the time the plan is submitted for approval. The Governor of the state involved must request the extension, and the Administrator must determine that the technology necessary to attain the standards is not then available, and that the state has taken or is planning to take all reasonably available control measures.<sup>16</sup> Subsection (f) provides a procedure for allowing particular sources to postpone the effective date of any requirement of any state plan after the plan has become effective. It requires that the Governor petition the Administrator for the postponement, and sets forth in detail the standards to be applied and procedures to be followed when petitions for postponements are brought.<sup>17</sup> Postponements may be granted for up to one year.

The Clean Air Act Amendments were enacted on December 31, 1970. Exactly 120 days later, on April 30, 1971, the EPA promulgated the national ambient standards for the six categories of "criteria

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<sup>15</sup> *Id.*

<sup>16</sup> *Id.* § 1857c-5(e) (1).

<sup>17</sup> *Id.* § 1857c-5(f). This provision is quoted in full at note 29 *infra*.

pollutants".<sup>18</sup> See 40 C.F.R. § 50 (1972). On August 14, 1971, the Administrator adopted regulations to guide the states in the formulation and submission of their implementations plans. Requirements for the Preparation, Adoption and Submittal of Implementation Plans, 40 C.F.R. § 51 (1972). Implementation plans were due nine months from the date of the promulgation of the ambient standards, on January 31, 1972. Forty states met the deadline; the other states all filed their plans within a short time thereafter. The Administrator announced his actions on the various plans May 31, 1972. 37 Fed.Reg. 10842 et seq.

Georgia was one of the forty states to meet the January 31, 1972, deadline. The Administrator announced his action on the Georgia Plan in the regulations published May 31, 1972. The Administrator disapproved the plan in two respects not material here and approved all other portions of the Plan. 37 Fed.Reg. 10859, promulgating 40 C.F.R. § 52.572-4. The petitioners docketed this petition for review, under 42 U.S.C. § 1857h-5(b), within the 30-day period that provision allows.<sup>19</sup>

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<sup>18</sup> See note 4 *supra*.

<sup>19</sup> Section 1857h-5(b) (1) provides:

A petition for review of the Administrator's action in approving or promulgating any implementation plan under section 1857c-5 . . . or section 1857c-6 (d) . . . may be filed only in the United States Court of Appeals for the appropriate circuit. Any such petition shall be filed within 30 days from the date of such promulgation or approval, or after such date if such petition is based solely on grounds arising after such 30th day.

## II.

The petitioners' first objection concerns a Georgia statute requiring the agencies responsible for Georgia's air quality program to keep confidential "any information" they obtain relating to "secret processes, devices, or methods of manufacture or production".<sup>20</sup> Ga.Code Ann. § 88-908 (1971). The petitioners contend that the Administrator's approval of this provision was prohibited by 42 U.S.C. § 1857c-5(a)(2)(F)(iii), (iv). Those two clauses require that the state implementation plan provide "for periodic reports on the nature and amounts of [stationary source] emissions" from all sources covered by the plan, and "that such reports shall be correlated by the State agency with any emission limitations or standards established pursuant to this Act, which reports shall be available . . . for public inspection".<sup>21</sup> The petitioners contend that Georgia's section 88-908 should have been disapproved because that statute, with its blanket protection of "any information" relating to trade secrets, would direct Georgia officials to block public access to emission data where such data could qualify as "trade secret" information, and that this violates section 1857c-5(a)(2)(F)(iii)-(iv).

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<sup>20</sup> Ga.Code Ann. § 88-908 provides in full:

Any information relating to secret processes, devices, or methods of manufacture or production obtained by the board, department or their employees in the administration of this Act shall be kept confidential.

<sup>21</sup> See also 40 C.F.R. § 51.10(e)-11(a)(6) (1972).

We agree. The public information and disclosure requirements of section 1857c-5(a)(2)(F)(iii)-(iv) have an important function under the 1970 Amendments. The Amendments embraced the concept of "citizen enforcement" of antipollution laws. 42 U.S.C. § 1857h-2 permits "any person" to bring a civil action in the federal district courts to enforce compliance with "any emission standard or limitation" promulgated under the Clean Air Act.<sup>22</sup> The public information requirements play a crucial role in assuring effective citizen enforcement. They are designed to ensure that "citizen enforcers" will have access to any and all information they will need in

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<sup>22</sup> Section 1857h-2(a) provides:

(a) Except as provided in subsection (b), any person may commence a civil action on his own behalf—

(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the Eleventh Amendment to the Constitution) who is alleged to be in violation of (A) an emission standard or limitation under this Act or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this Act which is not discretionary with the Administrator.

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an emission standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be.

prosecuting enforcement suits or in deciding whether to bring them.<sup>23</sup>

Georgia's section 88-908 would hamper the operation of the public information and disclosure requirements in Georgia. The statute directs officials to ignore their duty under the federal statute to assure the disclosure of *all* emission data if some emission data touches upon trade secrets. And the dictates of section 88-908 may be stern indeed, for a separate provision of the Georgia air pollution code threatens criminal penalties to an official who violates section 88-908.<sup>24</sup> In addition, section 88-908 could invite private parties to litigate questions whether emission data is "information relating to secret processes, devices, or methods of manufacture or production", and could thereby further impede the prompt and full disclosure of emission data.

In holding as we do, we are not insensitive to private interests in protecting confidential trade in-

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<sup>23</sup> The connection between the information sections of the statute, section 1857c-5(a)(2)(F)(iii, iv) and Section 1857c-9(c), and the citizen enforcement provision is recognized in the legislative history of the Act. See S.Rep. No. 91-1196, at 38 (1970); Hearings Before the Subcomm. on Air and Water Pollution of the Comm. on Public Works, on S. 3229, S. 3466, S. 3546, 91st Cong., 2d Sess., at 828, 829-30 (statement of Professor James W. Jeans, Chairman of the American Trial Lawyers' Committee on Environmental Laws).

<sup>24</sup> Ga.Code Ann. § 88-916 (1971) provides that "any person who shall violate any of the provisions of . . . this Act" shall be guilty of a misdemeanor. The petitioners contend this provision could be read to impose penalties on Georgia officials who release emission information in violation of § 88-908.



formation. We view that interest, however, as subordinate to the public interest in full disclosure of emission data. This was the balance Congress itself struck in the 1970 Amendments. The Amendments provide for the confidentiality of trade secrets contained in information supplied to *federal* officials, but expressly state that emission data is not entitled to trade secret protection. See 42 U.S.C. § 1857c-9 (c). The statute is not similarly explicit where information supplied to state officials is concerned, but there is no reason to strike the balance differently in that context.

The Administrator has himself disapproved provisions in fourteen state plans virtually indistinguishable from the provision in question here.<sup>25</sup> The EPA has presented no persuasive reason for distinguishing the situation here from the fourteen other situations in which the Administrator disapproved over inclusive confidentiality provisions.<sup>26</sup> We hold that this provision, like the fourteen others, violated section

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<sup>25</sup> The fourteen were Delaware, the District of Columbia, Idaho, Iowa, Kansas, Kentucky, Missouri, Nebraska, New Jersey, Rhode Island, Vermont, Washington, Wisconsin, and Wyoming. See 37 Fed. Reg. 10842 et seq. (May 31, 1972), announcing 40 C.F.R. § 52 (passim). See also *Natural Resources Defense Council v. EPA*, 1 Cir. 1973, 478 F.2d 875, 891-893 (invalidating Administrator's approval of a similar confidentiality provision in Massachusetts).

<sup>26</sup> The EPA attempts to defend the Administrator's action here, and to distinguish it from his action in the fourteen earlier instances, on the basis of two informal assurances EPA officials received from Georgia authorities. One came in a letter to the EPA dated May 4, 1972, from Robert H.

1857c-5(a)(2)(F)(iii), (iv), and should have been disapproved.

Accordingly, we order the Administrator to publish forthwith his disapproval of section 88-908.

### III.

The second objection the petitioners raise concerns a Georgia statute authorizing Georgia officials to grant variances from requirements of the implementation plan. Ga.Code Ann. § 88-912 empowers the Georgia Department of Public Health to grant variances from "the particular requirements of any rule, regulation or general order" in a number of circumstances; if the Department finds that "strict compliance . . . is inappropriate because of conditions beyond the control of the . . . persons . . . granted such variances"; if it finds "special circumstances

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Collom, Jr., then Chief of the Air Quality Control Section of the Environmental Protection Division of Georgia's Department of Natural Resources; the other was conveyed in a telephone conversation, on November 16, 1971, between EPA attorneys and Mr. Robert Bomar, then a Georgia assistant attorney general. The EPA asserts that it was these two assurances which led the Administrator to conclude that 88-908 would never be applied to require that emission data be kept confidential.

We have examined the Collom letter and have considered the EPA's account of the Bomar telephone conversation, however, and we find it impossible to say that those two informal assurances provide an adequate basis for the conclusion the Administrator allegedly drew. Those assurances cannot dispel the reasonable fear voiced by the petitioners that section 88-908 may interfere with the purposes of § 1857c-5(a)(2)(F)(iii), (iv).



which would render strict compliance unreasonable, unduly burdensome, or impractical"; if it finds that "strict compliance would result in substantial curtailment or closing down of . . . businesses, plants or operations". The statute specifies the procedures to be followed when variances are granted. A party seeking a variance must file a petition with the Director of the Department of Public Health, who makes an initial recommendation on the disposition of the petition. If his recommendation is against granting the variance, the Department must afford the party seeking the variance a hearing; if it is in favor of granting the variance, the Department must afford a hearing to any party aggrieved by the variance.<sup>27</sup>

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<sup>27</sup> The Georgia variance provision provides in full:

The department may grant specific or general classes of variances from the particular requirements of any rule, regulation or general order to such specific persons or class of persons or such specific source or general classes of sources of air contaminants upon such conditions as it may deem necessary to protect the public health and welfare, if it finds that strict compliance with such rule, regulation or general order is inappropriate because of conditions beyond the control of the person or classes of persons granted such variances, or because of special circumstances which would render strict compliance unreasonable, unduly burdensome, or impractical due to special physical conditions or causes, or because strict compliance would result in substantial curtailment or closing down of one or more businesses, plants or operations, or because no alternative facility or method of handling is yet available. Such variances may be limited in time. In determining whether or not such variances shall be granted, the department shall give

The petitioners' principal objection to this provision<sup>28</sup> is that it circumvents the provisions of 42 U.S.C. § 1857c-5(f), which, the petitioners argue, Congress intended to be the exclusive mechanism for

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consideration to the protection of the public health, safety and general welfare of the public, and weigh the equities involved and the relative advantages and disadvantages to the resident and the occupation or activity affected. Any person or persons seeking a variance shall do so by filing a petition therefor with the director of the department. The director shall promptly investigate such petition and make a recommendation as to the disposition thereof. If such recommendation is against the granting of the variance, a hearing shall be held thereon within 15 days after notice to the petitioner. If the recommendation of the director is for the granting of a variance, the department may do so without a hearing; Provided, however, that upon the petition of any person aggrieved by the granting of a variance, a public hearing shall be held thereon. A variance granted may be revoked or modified by the department after a public hearing which shall be held after giving at least 15 days prior notice. Such notice shall be served upon all persons, known to the department, who will be subjected to greater restrictions if such variance is revoked or modified, or are likely to be affected or who have filed with the department a written request for such notification.

Ga.Code Ann. § 88-912.

<sup>28</sup> The petitioners also object to the variance provision on the grounds (1) that it permits and directs Georgia officials to take into account economic and technical feasibility considerations to an impermissible extent; and (2) that it would undermine the state's legal authority to prevent the construction or modification of new stationary sources of emissions, in violation of 42 U.S.C. § 1857c-5(a)(2)(D), (a)(4). Because we hold the statute should not have been approved on the principal ground the petitioners advance, we have no occasion to address these contentions.

granting variances from requirements of state implementation plans. Section 1857c-5(f) speaks in terms of "postponements" of the effective dates of the requirements of implementation plans. It provides that "[p]rior to the date on which any stationary source . . . is required to comply with any requirement of an applicable implementation plan", the Administrator may grant a postponement of no more than one year of the effective date of the requirement. Section 1857c-5(f) requires that the Governor of the state apply to the Administrator for such a postponement. The substantive conditions of granting a section 1857c-5(f) postponement are strict. The Administrator must determine that "good faith efforts have been made to comply with such requirement"; that the source "is unable to comply . . . because the necessary technology or other alternative methods of control are not available or have not been available for a sufficient period of time"; that "any available alternative operating procedures and interim control measures have reduced or will reduce the impact of such source on public health"; and that "the continued operation of such source is essential to national security or to the public health or welfare". 42 U.S.C. § 1857c-5(f)(1)(A)-(D). The section imposes procedural requirements for the granting of a postponement: affected parties must be afforded an opportunity to be heard; the Administrator must make a statement of his findings and

conclusions; and judicial review is provided in the appropriate circuit courts of appeals.<sup>29</sup>

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<sup>29</sup> 42 U.S.C. § 1857c-5(f) provides in full:

"(f) (1) Prior to the date on which any stationary source or class of moving sources is required to comply with any requirement of an applicable implementation plan the Governor of the State to which such plan applies may apply to the Administrator to postpone the applicability of such requirement to such source (or class) for not more than one year. If the Administrator determines that—

"(A) good faith efforts have been made to comply with such requirement before such date,

"(B) such source (or class) is unable to comply with such requirement because the necessary technology or other alternative methods of control are not available or have not been available for a sufficient period of time,

"(C) any available alternative operating procedures and interim control measures have reduced or will reduce the impact of such source on public health, and

"(D) the continued operation of such source is essential to national security or to the public health or welfare,

then the Administrator shall grant a postponement of such requirement.

"(2) (A) Any determination under paragraph (1) shall (i) be made on the record after notice to interested persons and opportunity for hearing, (ii) be based upon a fair evaluation of the entire record at such hearing, and (iii) include a statement setting forth in detail the findings and conclusions upon which the determination is based.

"(B) Any determination made pursuant to this paragraph shall be subject to judicial review by the United States Court of Appeals for the circuit which includes such State upon the filing in such court within 30 days

The standards and procedures of section 1857c-5(f) are far more restrictive than the counterpart standards and procedures of Georgia's section 88-912. The petitioners argue that the restrictiveness of section 1857c-5(f) was deliberate on the part of Congress and that the section was intended to apply to all requests to change the application of particular requirements of state implementation plans after the adoption of the plans. They contend therefore that the Georgia provision is an impermissible attempt to frustrate the will of Congress.

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from the date of such decision of a petition by any interested person praying that the decision be modified or set aside in whole or in part. A copy of the petition shall forthwith be sent by registered or certified mail to the Administrator and thereupon the Administrator shall certify and file in such court the record upon which the final decision complained of was issued, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition the court shall have jurisdiction to affirm or set aside the determination complained of in whole or in part. The findings of the Administrator with respect to questions of fact (including each determination made under subparagraphs (A), (B), (C), and (D) of paragraph (1)) shall be sustained if based upon a fair evaluation of the entire record at such hearing.

“(C) Proceedings before the court under this paragraph shall take precedence over all the other causes of action on the docket and shall be assigned for hearing and decision at the earliest practicable date and expedited in every way.

“(D) Section 307(a) (relating to subpoenas) shall be applicable to any proceeding under this subsection.”

The EPA takes a different view of section 1857c-5(f). The Agency argues that the standards and procedures of that section are intended to apply only when the source in question is so large or has such serious effects that granting a postponement to that individual source will, by itself, threaten the attainment of a national ambient air standard. In other situations, the EPA argues, the states have power to grant variances under section 1857c-5(a)(3), which provides for "revisions" by the states of their implementation plans, subject to EPA review to determine whether the plan as revised still meets all the requirements of the statute.<sup>30</sup> The Administrator's theory is that each time a state grants an individual variance not sufficient to threaten attainment or maintenance of a national standard, it is merely "revising" its implementation plan. The Administrator has embodied this view of section 1857c-5(f) and of the "revision" authority of section 1857c-5(a)(3) in his Guidelines for the Preparation, Adoption, and Submittal of Implementation Plans. See 40 C.F.R. § 51.15(d), -.32 (1972).<sup>31</sup>

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<sup>30</sup> 42 U.S.C. § 1857c-5(a)(3) provides in full:

"(3) The Administrator shall approve any revision of an implementation plan applicable to an air quality control region if he determines that it meets the requirements, of paragraph (2) and has been adopted by the State after reasonable notice and public hearings."

<sup>31</sup> The Administrator's basic position is stated by 40 C.F.R. § 51.32(f):

A State's determination to defer the applicability of any portion(s) of the control strategy with respect to

We cannot accept the Administrator's reading of the statute. Nothing in the statute supports the limitation of section 1857c-5(f) to situations involving sources so large that a single variance granted it threatens the attainment of a national ambient standard. Section 1857c-5(f) speaks in terms of "any stationary source", and of the postponement of "any requirement of an applicable implementation plan". This language is not ambiguous and lends no basis for the construction the Administrator has given it. Nor does the revision authority of section 1857c-5(a) (3) lend any aid to the Agency's argument. A revision is a change in a generally applicable requirement; a postponement or variance a change in the application of a requirement to a particular party. The distinction between the two is familiar and clear. It is equally clear that it was this distinction Congress had in mind when it simultaneously adopted section 1857c-5(f) and section 1857c-5(a) (3)—the proce-

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such source(s) will not necessitate a request for postponement under this section unless such deferral will prevent attainment or maintenance of a national standard within the time specified in the plan: *Provided, however*, that any such determination will be deemed a revision of an applicable plan under § 51.6

40 C.F.R. § 51.15(d) provides further:

Except as otherwise provided by Subpart C of this part, neither the State agency nor a local agency shall grant any variance of, or exception to, any compliance schedule included in an applicable plan if such variance or exception will prevent, or interfere with, attainment or maintenance of a national standard within the time(s) specified pursuant to § 51.10(b) and (c).



dures of section 1857c-5(f) were to apply to *all* particular changes, and those of section 1857c-5(a)(3) to changes in rules of general application. There is no reason to believe that Congress intended that some, indeed most, changes of a particular character should be deemed "revisions" for the purposes of choosing a procedure for approving it.

Our conclusion is fortified by our view of the overall scheme of the Clean Air Act Amendments. The approach of the Amendments, as one commentator has expressed it, was to shift from the approach of earlier legislation of "establishing air pollution standards commensurate with existing technological feasibility" to a bolder "policy which forces technology to catch up with the newly promulgated standards". Note, *The Clean Air Amendments of 1970: Better Automotive Ideas from Congress*, 12 B.C.Ind. & Comm.L.Rev. 571, 581 (1971). As Senator Muskie, the Senate sponsor of the Amendments, put it:

The first responsibility of Congress is not the making of technological or economic judgments—or even to be limited by what is or appears to be technologically or economically feasible. Our responsibility is to establish what the public interest requires to protect the health of persons. This may mean that people and industries will be asked to do what seems to be impossible at the present time. But if health is to be protected, these challenges must be met.

116 Cong.Rec. 16091 (daily ed. Sept. 21, 1970), quoted at Note, *supra*, at 581. In a statute that consti-



tuted a "challenge to do what seem[ed] impossible", seeking to "forc[e] technology to catch up with the newly promulgated standards", it was essential to include a device to ensure that ambitious commitments made at the planning stage could not readily be abandoned when the time came to meet those commitments, and to assume the costs and burdens they entailed.

Section 1857c-5(f) is the device Congress chose to assure this. Congress aimed to make "variances", "postponements", or whatever departures from earlier commitments might be called, unusual and difficult to obtain. That is why Congress required applications for them to be made by the governors of the states, thus ensuring an initial screening of applications by high-level state officials. And that is why Congress imposed rigorous substantive conditions on the granting of variances, allowing them only when the unavailability of technology made compliance impossible, when continued operation of the source was essential to national security, public health, or public welfare, and when all available alternative control measures had been taken. Georgia's statute, allowing variances whenever a state official finds compliance would be "unduly burdensome", "unreasonable", or "inappropriate", or when he finds that compliance would require the closing of *any* source—whether or not the source is necessary to the public health or welfare or to national security—would be wholly inadequate to fulfill the part Congress planned for the federal post-

ponement provision, section 1857c-5(f), to play in the general strategy of the Clean Air Act Amendments.

The EPA advances an alternative to the theory based on the "revision" authority of section 1857c-5(a)(3) as a ground on which it suggests we may uphold, at least in part, the Administrator's approval of Section 88-912. The EPA suggests that, even if we hold that the state variance procedure is impermissible in the period *after* the date set for the initial attainment of the national ambient air standards (in mid-1975, for the primary standards), we might still approve the use of state variance procedures during the period preceding these dates. This suggestion derives from the decision of the First Circuit in a case involving a challenge, also mounted by the Natural Resources Defense Council, to the Administrator's approval of the Massachusetts and Rhode Island state plans. *Natural Resources Defense Council v. EPA*, 1 Cir. 1973, 478 F.2d 875.<sup>32</sup>

In that case, the Administrator had approved variance provisions in both the Massachusetts and Rhode Island plans very much like the variance provisions included in the Georgia Plan. In response to the NRDC's challenge to both states' provisions, 478 F.2d at 884-888, 891, the First Circuit held that state variance procedures could not be employed during what it labelled the "post-attainment period", be-

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<sup>32</sup> The view of the First Circuit was followed recently by the Eighth Circuit in deciding the NRDC's challenge to the Iowa state plan. *Natural Resources Defense Council v. EPA*, 8 Cir. 1973, 483 F.2d 690, 693-694.

cause it concluded that Congress intended that section 1857c-5(f) should provide the exclusive mechanism for altering the application of requirements of implementation plans over the long run, 478 F.2d at 887, expressly rejecting the theory based on the "revision" authority of section 1857c-5(a)(3). But the court allowed the use of state variance procedures during what it called the "pre-attainment period". Its rationale for this holding was its conclusion that the statute "anticipates greater flexibility during the pre-attainment period". It said:

We can see value in permitting a state to impose strict emission limitations now, subject to individual exemptions if practicability warrants; otherwise it may be forced to adopt less stringent limitations in order to accommodate those who, notwithstanding reasonable efforts, are as yet unable to comply.

478 F.2d at 887.

We are unable to agree that the statute envisions granting the states the kind of "flexibility" during the "pre-attainment period" which provisions like Georgia's section 88-912 would afford. The parts of the statute on which the First Circuit relied were the provision of section 1857c-5(a)(2)(A)(i) that primary standards had to be met, not immediately, but only "as expeditiously as practicable", but in no case later than three years from the adoption of the state plan, and the provision of section 1857c-5(e) for a possible two-year extension of the deadline in sharply

restricted circumstances. The First Circuit said that "[t]he provision for a three-year grace period, followed by the possibility of a further two-year extension, indicates that Congress did not expect immediate achievement of *standards*". 478 F.2d at 887 (emphasis supplied).

This statement, however, contains a crucial ambiguity, and it supports the First Circuit's holding only if that ambiguity is overlooked. It is of course true that the provision of a three-year grace period, and of the possibility, however limited, of an extension, do mean that Congress did not expect immediate achievement of *ambient* standards. But it does *not* follow that Congress did not contemplate that *emission* standards would not have to be met "immediately" as their scheduled dates—set by the implementation plan—arrived. We think that the provisions of section 1857c-5(a)(2)(A)(i) and section 1857c-5(e) do not provide *any* support for the latter conclusion. Nor do we find any support for that conclusion anywhere in the statute. Instead we find that the statute as a whole supports the general view of its overall strategy we articulated above: that the plan of the statute was to secure ambitious commitments at the planning stage, and then, by making it difficult to depart from those commitments, to assure that departures would be made only in cases of real need. That view precludes the conclusion that Congress intended the states to have the kind of "flexibility" state variance plans would give them.

Thus we hold that it was inconsistent with the statute for Georgia to adopt its own variance procedures, and that the Administrator exceeded his authority in approving section 88-912. Accordingly, we direct the Administrator to publish forthwith his disapproval of section 88-912.

#### IV.

The third objection the petitioners raise concerns Georgia's "control strategy" for meeting the national ambient air quality standards for particulate matter and sulfur dioxide.<sup>33</sup> Georgia's implementation plan, as submitted to the Administrator and approved by him in May 1972, made the permissible amounts of particulates and sulfur dioxide emissions dependent on the heights of the smokestacks at the sources; the higher its smokestacks, the more a source was permitted to emit. Georgia Rules and Regulations for Air Quality Control § 270-5-24-.02 (2) (g) (SO<sub>2</sub>),-(m) (particulates). This "tall stack" approach represents a form of "dispersion enhancement technique". Dispersion enhancement techniques are techniques to reduce concentrations of pollutants not by reducing the quantities emitted into the air—the objective of so-called "emission limitation" techniques—but rather by altering the conditions under

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<sup>33</sup> For the definition of the term "control strategy", and some examples of alternative "control strategies", see the Guidelines for the Preparation, Adoption and Submittal of Implementation Plans, 40 C.F.R. § 51.1(n) (1972).

which substances are emitted, in order to enhance their dispersion throughout the atmosphere.<sup>34</sup>

The petitioners contend that Georgia's choice of such a strategy is in conflict with 42 U.S.C. § 1857c-5(a)(2)(B). That subparagraph requires that state implementation plans "includ[e] emission limitations, schedules, and timetables for compliance with such limitations, and such other measures as may be necessary to insure attainment and maintenance of such primary or secondary standard". The petitioners contend that the directive to use "emission limitations", coupled with the reference to "other measures . . . necessary", means that "other measures", including any and all dispersion techniques,<sup>35</sup> may be employed only when "necessary" in the sense that all available emission limitation has been first achieved. And they suggest that Georgia had not adopted controls capable of achieving the maximum possible emission limitation before it adopted the tall stack controls.

The Agency raises a threshold issue, however, which we must decide before we may consider the merits of this objection. During oral argument in this case, on May 9, 1973, counsel for the EPA informed the Court that two days earlier the Agency had advised Georgia that it no longer considered the regulations setting forth the tall stack controls "valid

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<sup>34</sup> See note 2 *supra*.

<sup>35</sup> Dispersion enhancement techniques and emission limitation techniques are, in the sense in which we use the terms, mutually exclusive categories. See note 2 *supra*.

control techniques" under section 1857c-5(a)(2)(B). The Agency argued that this action mooted the petitioners' third objection. After argument, the EPA filed with this Court a copy of the letter by which the Agency had informed Georgia of its decision. This is a letter, dated May 7, 1973, from Mr. Jack E. Rayan, the EPA Regional Administrator, to Governor Jimmy Carter of Georgia.

We thus first address the question whether the action announced in the May 7 letter to Governor Carter moots the issue otherwise before the Court.

#### A.

The relevant portion of the EPA's letter to Governor Carter is this:

On May 31, 1972, the Administrator of the Environmental Protection Agency approved the Georgia Implementation Plan control strategy for attainment of the National Standards for particulates and sulfur dioxide. Further analysis by the Environmental Protection Agency has shown that the control strategy for attainment and maintenance of standards *allows the application of regulations* (GA. Regs. 270-5-24-.02-(2)-(g) and 270-5-24-.02-(2)-(m) *which permit unrestricted increases in stack height throughout* the State as a means of compliance. It is the determination of the Environmental Protection Agency that these regulations are not valid control techniques under Section [1857c-5(a)(2)(B)] of the Clean Air Act.

Therefore, as required by Section [1857c-5(a) (2) (H) (ii)] of the Clean Air Act, Georgia must revise its Plan by deleting the above cited regulations and submitting a substitute control strategy.

(Emphasis supplied).

The petitioners argue that the action announced in this letter fails to moot their third objection, because that action stops short of rejecting altogether Georgia's dispersion enhancement control strategy. They focus upon the passage we italicized in the letter. They point out that in the letter the EPA merely disapproved the *particular regulations* Georgia adopted, and not the entire idea of a dispersion enhancement control strategy. And they note that the vice of the regulations identified by the letter is *not* that the strategy they embody relies upon tall stacks, or that it relies upon dispersion enhancement, but merely that the regulations permitted *unrestricted* increases in stack height *throughout the state*. Thus, they argue, their dispute with the EPA over whether Georgia may employ a tall stack strategy is still a live one.

We agree. It has become manifest since the letter was sent to Governor Carter, that the EPA's objection to Georgia's regulations was not to their fundamental approach, but merely to their excessive breadth. The EPA on September 14, 1973, published proposed amendments to its Guidelines on the Preparation, Adoption and Submittal of Implementation Plans. These amendments include a proposed regula-



tion to govern the use of tall stacks for controlling sulfur dioxide and particulate matter pollution. 38 Fed.Reg. 25701, proposing 40 C.F.R. § 51.13(h). This regulation would generally allow the use of stack height increases to control pollution only up to "height[s] consistent with good engineering practice". However, large, isolated pollution sources would be allowed to undertake larger increases, provided that at the same time they were subjected to a more general set of dispersion-enhancing controls.<sup>36</sup>

<sup>36</sup> The EPA's proposed regulation provides in full:

(h) The increase of stack height up to a height consistent with good engineering practice is acceptable without qualification. An increase in stack height beyond this level is not an acceptable air quality control procedure unless accomplished as part of an approved supplementary control system (see Appendix P to this part). A stack which conforms to good engineering practice is sufficiently tall that emissions from the stack are unaffected by the atmospheric downwash, eddies and wakes which may be created by the facility itself, nearby structures or terrain obstacles. Emissions from facilities with stacks which do not conform to good engineering practice often cause excessively high ground-level concentrations and nuisances within and in the vicinity of the facility itself. For fairly level terrain, good engineering practice is normally taken to be a stack height  $2\frac{1}{2}$ -times the height of the facility or nearby structure. For complex terrain, the  $2\frac{1}{2}$ -times rule-of-thumb is too simplistic. For such cases, and for more detailed information on good engineering practices, the references listed should be consulted.

<sup>37</sup> Fed.Reg. 25701 (September 14, 1973), proposing 40 C.F.R. § 51.13(h).

This regulation would not by its own terms limit the use of unrestricted height increases to isolated sources; but that

This proposal makes it clear that the EPA's objection to Georgia's regulation is what the petitioners argue it to be: that the regulations permit unrestricted increases anywhere in the state, and not that they rely upon a dispersion control strategy. The regulations permit the use of stack height increases up to the point consistent with good engineering practice as a control strategy. And they permit the use of unrestricted stack height increases in prescribed circumstances for large, isolated sources. They do not reject the idea of a tall stack control strategy; and they certainly do not reject the more general idea of a dispersion enhancement strategy. Implicit in the Agency's statement that the regulations are faulty because they "permi[t] unrestricted stack height increases though[out] the state" is the message that the Agency would approve a more limited use of a tall stack strategy; and the proposed regulations make it clearer that this was and is the Agency's position. Thus, the EPA's position is still considerably at odds with the position taken by the petitioners.

An additional consideration leads us to decide the mootness question as we do. This is the need for

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limitation is implied in the limitation to situations where stack height increases are part of "an approved supplementary control system", since other parts of the regulations limit the use of supplementary control systems to large, isolated sources. "Supplementary control systems" refer to systems whereby industrial operations are staggered according to meteorological conditions in order to enhance dispersion, described briefly in note 2 *supra*.

expedition in finally settling on a control strategy for Georgia for combatting sulfur dioxide and particulate matter pollution. Months have elapsed since the EPA first notified Georgia of the withdrawal of approval of the tall stack regulations. Neither Georgia nor the Administrator has come forward with a proposed alternative to the tall stack regulations.<sup>37</sup> Georgia does have other regulations aimed at controlling sulfur dioxide and particulate emissions,<sup>38</sup> but the EPA has not argued here that these regulations are by themselves sufficient to assure attainment of the national ambient standards for particulates and sulfur dioxide.<sup>39</sup> Over half of the three year period allowed for the attainment of the primary standards has elapsed; and we see little to be gained by waiting further to see whether the Administrator will approve a substitute for the Georgia regulations disapproved last May.

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<sup>37</sup> The Administrator of the EPA is empowered to publish his own regulations if a state fails to revise its plan after having been notified by the Administrator of the need to do so. 42 U.S.C. § 1857c-5(c) (3).

<sup>38</sup> Ga. Rules and Regulations for Air Quality Control § 270-5-24.02 (2) (d)-(e). Those provisions are described more fully in part IV-C.

<sup>39</sup> See also note 51 *infra*.

## B.

12 U.S.C. § 1857c-5(a)(2)(B) provides:

The Administrator shall approve such [state implementation] plan, or any portion thereof, if he determines that . . .

\* \* \* \*

(B) it includes emission limitations, schedules, and timetables for compliance with such limitations, and such other measures as may be necessary to insure attainment and maintenance of such primary or secondary standard, including, but not limited to, land-use and transportation controls.

The issue before this Court, in interpreting this provision, is well framed in an EPA staff paper, now published in the Congressional Record. In framing the issue, we take the liberty of quoting at length from that paper:

It should be clear . . . that the intent of Congress in the Clean Air Act is that the State Implementation Plans must include emission limitations. It is also clear that the words "and such other measures as may be necessary" exclude the interpretation that emission reduction is the only acceptable means of meeting [national ambient air quality standards]. Between these two boundaries to interpretation there is a broad, unexplored territory.

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There are two basic approaches to this legally unexplored territory. The first approach, which may be called the broad approach, views the

[Act] in its entirety. . . . When [section 1857c-5(a)(2)(B)] is read in . . . light [of other provisions of the Act] emission reduction is clearly the preferred control method, and "such other measures" are allowed only if emission reduction sufficient to meet [the national standards] in the time specified (3 years) i[s] unavailable or infeasible—or, in the words of the Act, only if they are "necessary."

The second interpretation, which may be called the narrow approach, focuses on the objective of [section 1857c-5(a)(2)(B)] rather than the means of attaining that objective. The principal objective of [a state implementation plan] is that it meet primary and secondary standards by the appropriate deadline. Several means have been *suggested*, including emission limitation, land use, and transportation controls, but Congress was careful to add "such other measures" and "but not limited to." Thus, *any* means may be employed provided the ends are attained.

Monitoring and Data Analysis Division, Office of Air Quality Planning and Standards, Office of Air and Water Pollution, Environmental Protection Agency, Staff Paper—Intermittent Control Systems, 119 Cong.Rec. 10948, 10955-56 (daily ed. June 12, 1973) (emphasis in original).

We take the "broad approach" described in the quoted passage. We believe that approach reflects the intent of Congress in adopting section 1857c-5(a)(2)(B). Two major considerations underlie our conclusion.

First, we find that other provisions of the 1970

Amendments indicate that Congress intended in section 1857c-5(a)(2)(B) to require maximum use of emission standards. Some sections show a general preference on the part of Congress for emission standards; others show an understanding by Congress that the requirements of implementation plans would consist primarily of emission standards.

The sections exhibiting Congress's preference for emission standards are sections 1857c-6(a)(1) and 1857c-7(b)(1)(B). Those sections provide, respectively, for the establishment of federal emission standards for new sources (section 1857c-6(a)(1)) and for emissions of hazardous air pollutants (section 1857c-7(b)(1)(B)).<sup>40</sup> Both sections make clear that

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"Hazardous air pollutants" are defined by the statute as substances "to which no ambient air quality standard is applicable and which . . . may cause, or contribute to, an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness". 42 U.S.C. § 1857c-7(a)(1). Compare the definition of criteria pollutants quoted at note 4 *supra*.

Under the Amendments, emissions of hazardous air pollutants from any source, and all emissions from new stationary sources, are to be regulated wholly by *federal emission* standards. In these two contexts, the statute abandons the "two-phase" approach to standard-setting adopted by sections 1857c-3-5 for the control of emissions of the major "criteria" pollutants from existing stationary sources; no ambient standards are set or employed, and reliance is placed instead entirely upon emission standards. The emission standards for new sources are standards "which reflect the [best] degree of emission limitation achievable through the application of the best system of emission reduction" which has been adequately demonstrated, § 1857c-6(a)(1), (b)(1)(B); the standards for hazardous pollutants are stand-

the Administrator is to establish *emission standards*; they do not contemplate control of pollution from new sources or of hazardous pollutants by dispersion techniques, or by any other techniques besides emission limitation. See also *EPA Staff Paper, supra*, 119 Cong.Rec. at 10955 (daily ed. June 12, 1973).

Sections 1857c-6(d)(1) and 1857h-2(a)(1) exhibit a congressional understanding that implementation plans would generally rely upon emission limitations. Section 1857c-6(d)(1) requires the states to promulgate supplementary implementation plans establishing standards for the emissions from existing sources of "non-criteria pollutants" when emissions of those substances from new sources are regulated by federal standards adopted under section 1857c-6(a)-(b). It states that *emission standards* are to be established, and it says they shall be established by "a procedure similar to that provided by section 1857c-5". The EPA's staff paper aptly states why this implies emission standards are required under section 1857c-5(a)(2)(B):

This section requires *emission standards* for *existing* sources of non-criteria pollutants established "by a procedure similar to that provided under [section 1857c-5]." This clearly implies that *emission standards* are required under Section [1857c-5]. This implication is made not only by the plain language of the Act,

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ards "which in [the Administrator's] judgment provid[e] an ample margin of safety to protect the public health from such hazardous air pollutant". § 1857c-7(b)(1)(B).

but also on equity grounds. Why should *emission* standards be required of *existing* sources of non-criteria pollutants when such *emission* standards are not required for criteria pollutants? When Section [1857c-5(a)(B)] is read in this light, emission reduction is clearly the preferred control method, and "such other measures" are allowed only if emission reduction sufficient to [the national standards] in the time specified (3 years) i[s] unavailable or infeasible—or, in the words of the Act, only if they are "necessary".

EPA Staff Paper, *supra*, 119 Cong.Rec. at 10955-56.

But the provision we think most important to note in this context is Section 1857h-2(a)(1), the citizen enforcement provision. That paragraph provides:

- (a) Except as provided in subsection
- (b) any person may commence a civil action in his own behalf—

(1) against any person . . . who is alleged to be in violation of (A) an *emission standard or limitation* under this act or (B) an order issued by the Administrator or a State with respect to such *standard or limitation*.

(Emphasis supplied). We find in this section powerful evidence that Congress intended that the requirements of implementation plans would wherever possible be emission limitations. If, as the "narrow approach" implies, the states may treat emission limitation and dispersion enhancement simply as alternative "means" of attaining the "objective" of meeting the national standards, then the states, with



EPA approval, may choose requirements citizen enforcers are not empowered to enforce over requirements they would be empowered to enforce. We cannot believe Congress intended such a result. Citizen enforcers were supposed to be the watchdogs of the public enforcers, the EPA and the states. We cannot believe Congress would have afforded the states and the EPA a means by which they could unilaterally curtail the scope of their watchdogs' surveillance. This provision, too, evinces a congressional understanding that section 1857c-5(a)(2)(B) requires maximum use of emission standards and limitations.

The second consideration supporting our view of Congress's intent is the Clean Air Act's so-called policy of "nondegradation". This policy holds that areas of clean air—areas where the air quality indices read above the levels set by the national standards—must not be degraded, even though degradation will not reduce the quality of the air below the levels specified by the standards. The Act does not anywhere expressly adopt a nondegradation policy; but there is abundant evidence that nondegradation is an important goal of the Act. That evidence has been marshalled elsewhere. *Sierra Club v. Ruckelshaus*, D.C.D.C.1972, 344 F.Supp. 253, 255. We need do no more here than gather it in the margins.<sup>41</sup> By

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<sup>41</sup> The principal textual basis of the policy is contained in the Act's statement of purposes. Section 1857(b)(1) announces that a purpose of the Clean Air Act is "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare". An administrative regulation under the 1967 Amendments to the Act, pub-

now the most important authority recognizing non-degradation as a policy of the Act is the Sierra Club

lished by the Department of Health, Education, and Welfare, the agency which at that time was responsible for the administration of the Act, was the first to recognize that the "protect and enhance" language implied a nondegradation policy:

[A]n explicit purpose of the Act is "to *protect and enhance* the quality of the Nation's air resources" (emphasis added). Air quality standards which, even if fully implemented, would result in significant deterioration of air quality in any substantial portion of an air quality region clearly would conflict with this expressed purpose of the law.

National Air Pollution Control Administration, U.S. Department of Health, Education, and Welfare, Guidelines for the Development of Air Quality Standards and Implementation Plans, Part I § 1.51, at 7 (1969).

The legislative history of the 1970 Amendments abundantly demonstrates that the position taken in the old HEW regulations was valid and that it would remain so under the 1970 Amendments. Both then Secretary of HEW Finch and his Undersecretary Veneman testified that nondegradation was and would be a policy of the Clean Air Act during the 1970 hearings on the Amendments. Hearings Before the Subcomm. on Air and Water Pollution of the Senate Comm. on Public Works on S. 3229, S. 3466, S. 3546, 91st Cong., 2d Sess. at 132-33, 143 (1970); Hearings on Air Pollution and Solid Waste Recycling Before the Subcomm. on Public Health and Welfare of the House Interstate and Foreign Commerce Comm., 91st Cong., 2d Sess. at 280, 287 (1970). More important, the Senate Report on the Amendments openly and unequivocally embraced the nondegradation policy:

In areas where current air pollution levels are already equal to or better than the air quality goals, the Secretary shall not approve any implementation plan which does not provide, to the maximum extent practicable, for the continued maintenance of such ambient air quality.

S.Rep.No.91-1196 at 2 (1970). The House Report implies the same thing. H.R.Rep.No.91-1146 at 1, 2, 5 (1970).

decision, affirmed by an equally divided Supreme Court. See *Fri v. Sierra Club*, 1973, 412 U.S. 541, 93 S.Ct. 2770, 37 L.Ed.2d 140.

The use of dispersion techniques is at odds with the nondegradation policy. Dispersion enhancement techniques operate by keeping pollutants out of areas of high pollutant concentration, and dispersing them to lower concentration areas; their objective is to reduce concentrations in high-concentration areas. Inevitably, however, the pollutants emitted into the atmosphere must end up somewhere; and the atmosphere at their destination, wherever that may be, will be degraded, in violation of the congressional policy. The only techniques fully capable of guaranteeing nondegradation are emission limitation techniques.

Our conclusion as to the Congressional objective in enacting section 1857c-5(a)(2)(B) draws further support from two items in the legislative history of the Amendments. The first and most important is that Congress chose the language of this section over language that would clearly have allowed alternatives to emission limitations to be used. The Administration and House bills in 1970 allowed the approval of a state plan if it included "emission standards, or *equivalent measures*, and such other measures as may be necessary to achieving or preserving" the national standards. S. 3466, § 7(c)(1)(C)(i). The second is a statement by Senator Muskie during the debates on the Amendments:

In order to implement the national ambient air quality standards, these [state implementation]

plans must provide for emission limitations on all sources in the region covered by the plan

...

116 Cong.Rec. 42384 (Dec. 18, 1970).

Our conclusion that the "broad approach" to section 1857c-5(a)(2)(B) accurately reflects the statutory intent does not end the question, however. For the EPA's defense of Georgia's "tall stack" strategy does not rest entirely, or even primarily, on the so-called "narrow approach". It rests, instead, upon the fact that Georgia has regulations apart from the "tall stack" regulations which impose limits on the emissions of sulfur dioxide and particulate matter. Responding to this argument requires that we first discuss briefly what the regulations on which the EPA relies provide.

### C.

As submitted to the Administrator in 1972, the Georgia Rules and Regulations for Air Quality Control stipulated three separate quantitative limitations on emissions of particulate matter. One quantitative limit applied only to manufacturing sources;<sup>42</sup> a second applied only to fuel-burning sources.<sup>43</sup> The third limit, applicable to all sources, was expressed as a function of stack height; the regulation containing this limit was one of the two disapproved by the EPA

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<sup>42</sup> Georgia Rules and Regulations for Air Quality Control § 270-5-24-.02(2)(e).

<sup>43</sup> *Id.* § 270-5-24-.02(2)(d).

in May 1973.<sup>44</sup> The two limits were cumulative, so that the effective limit for any given source was the lower of the two limitations applicable to it.<sup>45</sup>

The Georgia Regulations imposed only one express quantitative limit on the permissible level of sulfur dioxide emissions; this was the limitation, now disapproved, expressed in terms of stack height.<sup>46</sup> But Georgia also had a regulation, still effective today, limiting the permissible sulfur content of the fuel fuel-burning sources may use.<sup>47</sup> The aim and effect of this provision was to limit sulfur dioxide emissions; so the regulation is an "emission limitation", in the broad sense of the term.<sup>48</sup> Since fuel-burning sources are virtually the only sources of sulfur dioxide emissions in Georgia,<sup>49</sup> Georgia does have an "emission limiting" regulation applicable to every source of sulfur dioxide in the state.

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<sup>44</sup> *Id.* § 270-5-24-.02(2) (m).

<sup>45</sup> Air Quality Control Branch, Georgia Department of Public Health, Implementation Plan for Attainment of State and National Ambient Standards at 91 (1972) [hereinafter cited as Georgia State Plan]; Record at 340.

<sup>46</sup> Georgia Rules and Regulations for Air Quality Control § 270-5-24-.02(2) (g) (1).

<sup>47</sup> *Id.* § 270-5-24-.02(2) (g) (3).

<sup>48</sup> See note 2 *supra*.

<sup>49</sup> The EPA asserted before us that sulfuric acid plants used the only manufacturing process in Georgia which was a source of sulfur dioxide emissions. The petitioners did not contest the assertion, and we accept it as true. A special section of the Georgia regulations imposes a special limit on SO<sub>2</sub> emissions from sulfuric acid plants. Georgia Regulations § 270-5-24-.02(2) (j).

The EPA's primary argument rests upon the limitations on sulfur dioxide and particulate emissions that are not related to stack height. The EPA notes (1) that the Georgia Plan, as initially approved, contained an "emission limiting" regulation applicable to every source in the state; and (2) that the Plan as approved guaranteed attainment and maintenance of the national ambient standards for particulates and sulfur dioxide. This, the EPA argues, should be sufficient to satisfy any requirement that plans include "emission limitations" section 1857c-5(a)(2)(B) may impose.

The EPA's argument mistakes the nature of the "broad approach" to section 1857c-5(a)(2)(B). That provision is not satisfied merely because a state plan includes a stated emission limitation applicable to every source in the state, and also, with the help of dispersion techniques, guarantees attainment of the national standards.<sup>50</sup> The "broad approach"—as ex-

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<sup>50</sup> If this were sufficient to satisfy the requirement of section 1857c-5(a)(2)(B), that requirement could be easily evaded. A state desiring to rely on a dispersion "control strategy" could simply include in its plan a regulation stating a quantitative limit on emissions so high that no source would ever need be concerned about it. The state would in effect be relying entirely upon its dispersion regulations to meet the standards; but its plan would contain an emission limitation formally applicable to every source in the state.

If this possibility seems far-fetched, it nonetheless serves to emphasize the fact that in enforcing the requirement of section 1857c-5(a)(2)(B), where a state plan includes both emission limitations and dispersion enhancement controls, a reviewing court must scrutinize the emission limitations included in the plan to determine the relative degrees of reliance

pressed by the EPA's own staff paper—demands something more. It allows dispersion techniques to be used only if there is a demonstration that "emission reduction sufficient to meet [the national standards] in the time specified (3 years) is unavailable or infeasible—or, in the words of the Act—only if they are 'necessary.'" EPA Staff Paper, *supra*, 119 Cong. Rec. at 10955.

This standard implies that a control strategy such as Georgia's tall stack strategy may be included in a state's plan only under one of two conditions. It may be included only (1) if it is demonstrated that emission limitation regulations included in the plan are sufficient *standing alone*, without the dispersion strategy, to attain the standards; or (2) if it is demonstrated that emission limitation sufficient to meet the standard is unachievable or infeasible, and that the state has adopted regulations which will attain the maximum degree of emission limitation achievable.

The EPA has never suggested that Georgia can meet the second of these conditions; it has, however, hinted that Georgia's emission limitation regulations may be sufficient by themselves to attain the standards. However, the record before us is unclear on

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the state plan places upon emission limitation and dispersion enhancement. Once that fact is recognized, the only question is what the objective of such scrutiny should be; and, in our view, the implication of the so-called "broad approach" to section 1857c-5(a)(2)(B) is that the objective should be to determine whether the reliance placed upon emission limitation is as great as possible.

that question. There are indications in the Georgia plan that the tall stack control strategy was a crucial part of the state's program for attaining the standards.<sup>51</sup> We are unable at this time and on this record to make a judgment as to whether the emission limitations in the Georgia plan will be sufficient to attain the national standards. More important, however, it would be inappropriate for us to make such a judgment, for it appears to us that the Administrator himself has never formally determined whether those requirements are independently sufficient to guarantee attainment of the national standards. All the Administrator determined in May 1972 was that the Plan, with the *combination* of those regulations

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<sup>51</sup> With respect to particulates, the Plan states:

The stack height limitation prevents large sources, even though they meet the requirement based on heat input or process weight rater, from releasing large quantities of particulates from short stacks and thereby causing the ambient standard to be exceeded.

Georgia Plan at 91; Record at 340. With respect to sulfur dioxide, the Plan seems to indicate fairly clearly that the stack-height regulations were adopted as a substitute for available emission reduction devices:

Since the economics and efficiency of SO<sub>2</sub> removal equipment are uncertain at this time, no boiler curve or process weight rater formula were adopted for existing sources. The stack height formula for SO<sub>2</sub> emissions does insure that ambient conditions will not exceed the air quality standards, by requiring restrictions on emissions from stacks which are too short for the amount of SO<sub>2</sub> emitted. If a source is in excess of the emissions allowed by the stack height formula then the options of SO<sub>2</sub> removal or stack height extension are available.

*Id.*





and the tall stack regulations, would guarantee attainment of the standards; all he determined in May 1973 was that the tall stack regulations were inappropriate under the Agency's then emerging policy on dispersion enhancement techniques.

Under our holding, however, an explicit determination of this matter by the Administrator is a crucial first step in disposing of the petitioners' third objection. Accordingly, the first step in fashioning an order to dispose of that objection is to order the Administrator to make an explicit determination on this question. The Administrator should make this determination as promptly as is administratively feasible.

If the Administrator determines that the regulations are sufficient to assure attainment, he shall file with this Court a short statement of his conclusions and the grounds for it. The petitioners should respond promptly to such a filing by the Administrator. If the Administrator determines that the regulations are not independently sufficient to assure attainment, then it will be his duty to promulgate regulations which do assure attainment of the standards. If the Administrator does determine the existing regulations are insufficient to assure attainment, he should promptly notify the Court of his determination. When and if the Administrator does make such a determination, we shall consider issuing further guidelines in accordance with this opinion to govern the process of preparing and publishing substitute regulations specifying a control strategy for particulates and sulfur dioxide in Georgia.

## V.

The petitioners' final challenge is to the Administrator's approval of portions of section 88-906 of the Georgia Code. That provision, entitled "Factors to be considered in exercising powers and responsibilities related to air quality", sets out a list of factors the Board of Health and Department of Public Health are to consider in exercising their responsibilities under the Georgia air quality code. The petitioners object to the inclusion of five of these factors. These are:

- (h). The availability of air-cleaning devices
- (i). Economic feasibility of air-cleaning devices
- \* \* \* \*
- (k). Effect on efficiency of industrial operations from use of air-cleaning devices
- \* \* \* \*
- (o). The economic and industrial development of the State and the social and economic value of the source of air contaminants
- (q). Other factors which the Department may find applicable.

The petitioners contend that the inclusion of these factors in the list undermines the intent of Congress that considerations of public health should always take precedence over considerations of economic impact or technical feasibility under the Clean Air Act.

We agree that the Administrator's approval of the challenged portions of this Georgia statute violated the Amendments. The statute implies that considera-

tion of economic factors be limited in two respects. First, Congress made it clear that considerations of economic cost or technical feasibility were *always* to be subordinate to considerations of public health. Second, and as a corollary to this, Congress made it clear that cost and feasibility were not to be considered in meeting the three-year deadlines for attaining national primary standards. Those standards are set in terms of what is required for the protection of public health.

The legislative history of the Amendments, fortified by statements made by some of the draftsmen of the Amendments since the enactment of the Amendments, supports this conclusion. The House version of the Amendments included the phrase "giving due consideration to the economic and technological feasibility of compliance". The phrase was removed in the House-Senate Conference, after what Senator Thomas F. Eagleton remembers as "hours" of debate.<sup>52</sup> The Senate Report on the Amendments states

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<sup>52</sup> Senator Eagleton stated in February 1972:

On this question of an economic factor, I am as positive about this as a mortal can be, that was specifically written out of the bill because many hours were spent in conference debating the economic feasibility factor and the House had such language in the bill as, "Giving due consideration to economic and technological feasibility of compliance." That appeared in more than one place in the House bill and it was stricken from the bill in conference to go back to the Senate version which had no economic factor as far as protection of public health was concerned.

the essential position of the Amendments with respect to cost and feasibility factors:

The Committee determined that 1) the health of the people is more important than the question of whether the early achievement of ambient air quality standards protective of health is technically feasible; and 2) the growth of the pollution load in many areas, even with the application of available technology, would be deleterious to public health. Therefore, the Committee determined that existing sources of pollutants should meet the standard of law or be closed down. . . . S.Rep. No. 91-1196 at 2-3 (1970). The Senate Subcommittee on Air and Water Pollution, which had been responsible for drafting the Senate version of the Amendments, sent a briefing paper to the Administrator in early 1972. In that paper, the Subcommittee stated its understanding of the matter:

Inclusion of a test of social and economic feasibility of compliance with those control requirements necessary to achieve protection of public health as part of implementation plan guidelines compromises the intention of the Act . . .

Hearings Before the Subcomm. on Air and Water Pollution of the Senate Comm. on Public Works on

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<sup>52</sup> [Continued]

Hearings Before the Subcomm. on Air and Water Pollution of the Senate Comm. on Public Works on the Implementation of the Clean Air Act Amendments of 1970, 92d Cong., 2d Sess., at 21 (1972).

the Implementation of the Clean Air Act Amendments of 1970, 92d Cong., 2d Sess. at 308 (1972).

The vice in section 88-906 is similar to the vice in Georgia's trade secrets provision: it is overinclusive. The provision does not distinguish between situations where cost and feasibility considerations compete with other considerations and those where they do not. It is, of course, appropriate for state air pollution control officials to take into account cost and feasibility factors in most circumstances; their doing so is proscribed only when those considerations are in conflict with considerations of public health. As it stands, the provision may deflect state officials from properly discharging their duties under the state implementation plan. And, like the trade secrets provision, it may invite time-consuming litigation brought by private parties, litigation which could impede the progress of the state's implementation plan.

In support of the Administrator's approval of the statute, the EPA notes that consideration of economic factors is proper in the context of the attainment of the national *secondary* standards, and asserts that section 88-906(h)-(i), (k), (o), and (q) will be applied only in that context. We cannot accept this argument. The language of the statute still exists on the statute books, and still, on its face, directs officials to weigh these considerations against considerations of public health. As long as this is the case, there will remain a danger that state officials will be influenced by the statute.

Thus we conclude that the Administrator's approval of the statute exceeded his authority, and direct him to publish forthwith his disapproval of section 88-906(h)-(i), (k), (o), and (q).

#### ORDER

The actions the Administrator is directed to take in accordance with this opinion are set forth in the final paragraph of sections II, III, and V of this opinion, and in the final two paragraphs of section IV.

It is so ordered.

APPENDIX B

UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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OCTOBER TERM, 1972

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No. 72-2402

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NATURAL RESOURCES DEFENSE COUNCIL, INC., Project  
on Clean Air, Save America's Vital Environment,  
Inc., JANEY WEBER and SUSANNE ALLSTROM,  
PETITIONERS,

*versus*

ENVIRONMENTAL PROTECTION AGENCY,  
RESPONDENT.

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Petition for Review of an Order of the Environmental  
Protection Agency (GEORGIA CASE)

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Before WISDOM, DYER and INGRAHAM, Circuit  
Judges.

JUDGMENT

This cause came on to be heard on the petition of  
Natural Resources Defense Council, Inc., et al for  
review of an order of the Environmental Protection  
Agency, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the order of the Environmental Protection Agency in this cause be, and the same is hereby, reversed;

It is further ordered that respondent pay to petitioners, the costs on appeal to be taxed by the Clerk of this Court.

February 8, 1974

Issued as Mandate: March 4, 1974



## APPENDIX C

## CLEAN AIR AMENDMENTS OF 1970

\* \* \* \*

## NATIONAL AMBIENT AIR QUALITY STANDARDS

## "SEC. 109. (a) (1) The Administrator

"(A) within 30 days after the date of enactment of the Clean Air Amendments of 1970, shall publish proposed regulations prescribing a national primary ambient air quality standard and a national secondary ambient air quality standard for each air pollutant for which air quality criteria have been issued prior to such date of enactment; and

"(B) after a reasonable time for interested persons to submit written comments thereon (but no later than 90 days after the initial publication of such proposed standards) shall by regulation promulgate such proposed national primary and secondary ambient air quality standards with such modifications as he deems appropriate.

"(2) With respect to any air pollutant for which air quality criteria are issued after the date of enactment of the Clean Air Amendments of 1970, the Administrator shall publish, simultaneously with the issuance of such criteria and information, proposed national primary and secondary ambient air quality standards for any such pollutant. The procedure provided for in paragraph (1)(B) of this subsection shall apply to the promulgation of such standards.

"(b) (1) National primary ambient air quality standards, prescribed under subsection (a) shall be

ambient air quality standards the attainment and maintenance of which in the judgment of the Administrator, based on such criteria and allowing an adequate margin of safety, are requisite to protect the public health. Such primary standards may be revised in the same manner as promulgated.

“(2) Any national secondary ambient air quality standard prescribed, under subsection (a) shall specify a level of air quality the attainment and maintenance of which in the judgment of the Administrator, based on such criteria, is requisite to protect the public welfare from any known or anticipated adverse effects associated with the presence of such air pollutant in the ambient air. Such secondary standards may be revised in the same manner as promulgated.

[42 U.S.C. 1857c-4]

#### IMPLEMENTATION PLANS

“SEC. 110. (a) (1) Each State shall, after reasonable notice and public hearings, adopt and submit to the Administrator, within nine months after the promulgation of a national primary ambient air quality standard (or any revision thereof) under section 109 for any air pollutant, a plan which provides for implementation, maintenance and enforcement of such primary standard in each air quality control region (or portion thereof) within such State. In addition, such State shall adopt and submit to the Administrator (either as a part of a plan submitted

under the preceding sentence or separately) within nine months after the promulgation of a national ambient air quality secondary standard (or revision thereof), a plan which provides for implementation, maintenance and enforcement of such secondary standard in each air quality control region (or portion thereof) within such State. Unless a separate public hearing is provided, each State shall consider its plan implementing such secondary standard at the hearing required by the first sentence of this paragraph.

“(2) The Administrator shall, within four months after the date required for submission of a plan under paragraph (1), approve or disapprove such plan for each portion thereof. The Administrator shall approve such plan, or any portion thereof, if he determines that it was adopted after reasonable notice and hearing and that—

“(A) (i) in the case of a plan implementing a national primary ambient air quality standard, it provides for the attainment of such primary standard as expeditiously as practicable but (subject to subsection (e)) in no case later than three years from the date of approval of such plan (or any revision thereof to take account of revised primary standard); and, (ii) in the case of a plan implementing a national secondary ambient air quality standard, it specifies a reasonable time at which such secondary standard will be attained;

“(B) it includes emission limitations, schedules, and timetables for compliance with such limitations, and such other measures as may be

necessary to insure attainment and maintenance of such primary or secondary standard, including, but not limited to, land-use and transportation controls;

“(C) it includes provision for establishment and operation of appropriate devices, methods, systems, and procedures necessary to (i) monitor, compile, and analyze data on ambient air quality and, (ii) upon request, make such data available to the Administrator;

“(D) it includes a procedure, meeting the requirements of paragraph (4), for review (prior to construction or modification) of the location of new sources to which a standard of performance will apply;

“(E) it contains adequate provisions for intergovernmental cooperation, including measures necessary to insure that emissions of air pollutants from sources located in any air quality control region will not interfere with the attainment or maintenance of such primary or secondary standard in any portion of such region outside of such State or in any other air quality control region;

“(F) it provides (i) necessary assurances that the State will have adequate personnel, funding, and authority to carry out such implementation plan; (ii) requirements for installation of equipment by owners or operators of stationary sources to monitor emissions from such sources; (iii) for periodic reports on the nature and amounts of such emissions; (iv) that such reports shall be correlated by the State agency with any emission limitations or standards established pursuant to this Act, which reports shall be available at reasonable times for public in-

spection; and (v) for authority comparable to that in section 303, and adequate contingency plans to implement such authority;

“(G) it provides, to the extent necessary and practicable, for periodic inspection and testing of motor vehicles to enforce compliance with applicable emission standards; and

“(H) it provides for revision, after public hearings, of such plan (i) from time to time as may be necessary to take account of revisions of such national primary or secondary ambient air quality standard or the availability of improved or more expeditious methods of achieving such primary or secondary standard; or (ii) whenever the Administrator finds on the basis of information available to him that the plan is substantially inadequate to achieve the national ambient air quality primary or secondary standard which it implements.

“(3) The Administrator shall approve any revision of an implementation plan applicable to an air quality control region if he determines that it meets the requirements of paragraph (2) and has been adopted by the State after reasonable notice and public hearings.

“(4) The procedure referred to in paragraph (2) (D) for review, prior to construction or modification, of the location of new sources shall (A) provide for adequate authority to prevent the construction or modification of any new source to which a standard of performance under Section 111 will apply at any location which the State determines will prevent the attainment or maintenance within any air quality

control region (or portion thereof) within such State of a national ambient air quality primary or secondary standard, and (B) require that prior to commencing construction or modification of any such source, the owner or operator thereof shall submit to such State such information as may be necessary to permit the State to make a determination under clause (A).

“(b) The Administrator may, wherever he determines necessary, extend the period for submission of any plan or portion thereof which implements a national secondary ambient air quality standard for a period not to exceed eighteen months from the date otherwise required for submission of such plan.

“(c) The Administrator shall, after consideration of any State hearing record, promptly prepare and publish proposed regulations setting forth an implementation plan, or portion thereof, for a State if—

“(1) The State fails to submit an implementation plan for any national ambient air quality primary or secondary standard within the time prescribed,

“(2) the plan, or any portion thereof, submitted for such State is determined by the Administrator not to be in accordance with the requirements of this section, or

“(3) the State fails, within 60 days after notification by the Administrator or such longer period as he may prescribe, to revise an implementation plan as required pursuant to a provision of its plan referred to in subsection (a) (2) (H).

If such State held no public hearing associated with respect to such plan (or revision thereof), the Administrator shall provide opportunity for such hearing within such State on any proposed regulation. The Administrator shall, within six months after the date required for submission of such plan (or revision thereof), promulgate any such regulations unless, prior to such promulgation, such State has adopted and submitted a plan (or revision) which the Administrator determines to be in accordance with the requirements of this section.

“(d) For purposes of this Act, an applicable implementation plan is the implementation plan, or most recent revision thereof, which has been approved under subsection (a) or promulgated under subsection (c) and which implements a national primary or secondary ambient air quality standard in a State.

“(e) (1) Upon application of a Governor of a State at the time of submission of any plan implementing a national ambient air quality primary standard, the Administrator may (subject to paragraph (2)) extend the three-year period referred to in subsection (a)(2)(A)(i) for not more than two years for an air quality control region if after review of such plan the Administrator determines that—

“(A) one or more emission sources (or classes of moving sources) are unable to comply with the requirements of such plan which implement such primary standard because the necessary technology or other alternatives are not available or will not be available soon enough to per-

mit compliance within such three-year period, and

“(B) the State has considered and applied as a part of its plan reasonably available alternative means of attaining such primary standard and has justifiably concluded that attainment of such primary standard within the three years cannot be achieved.

“(2) The Administrator may grant an extension under paragraph (1) only if he determines that the State plan provides for—

“(A) application of the requirements of the plan which implement such primary standard to all emission sources in such region other than the sources (or classes) described in paragraph (1) (A) within the three-year period, and

“(B) such interim measures of control of the sources (or classes) described in paragraph (1) (A) as the Administrator determines to be reasonable under the circumstances.

“(f) (1) Prior to the date on which any stationary source or class of moving sources is required to comply with any requirement of an applicable implementation plan the Governor of the State to which such plan applies may apply to the Administrator to postpone the applicability of such requirement to such source (or class) for not more than one year. If the Administrator determines that—

“(A) good faith efforts have been made to comply with such requirement before such date,

“(B) such source (or class) is unable to comply with such requirement because the necessary



technology or other alternative methods of control are not available or have not been available for a sufficient period of time,

“(C) any available alternative operating procedures and interim control measures have reduced or will reduce the impact of such source on public health, and

“(D) the continued operation of such source is essential to national security or to the public health or welfare, then the Administrator shall grant a postponement of such requirement.

“(2) (A) Any determination under paragraph (1) shall (i) be made on the record after notice to interested persons and opportunity for hearing, (ii) be based upon a fair evaluation of the entire record at such hearing, and (iii) include a statement setting forth in detail the findings and conclusions upon which the determination is based.

“(B) Any determination made pursuant to this paragraph shall be subject to judicial review by the United States Court of Appeals for the circuit which includes such State upon the filing in such court within 30 days from the date of such decision of a petition by any interested person praying that the decision be modified or set aside in whole or in part. A copy of the petition shall forthwith be sent by registered or certified mail to the Administrator and thereupon the Administrator shall certify and file in such court the record upon which the final decision complained of was issued, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition the court shall have jurisdiction to af-

firm or set aside the determination complained of in whole or in part. The findings of the Administrator with respect to questions of fact (including each determination made under subparagraphs (A), (B), (C), and (D) of paragraph (1)) shall be sustained if based upon a fair evaluation of the entire record at such hearing.

“(C) Proceedings before the court under this paragraph shall take precedence over all the other causes of action on the docket and shall be assigned for hearing and decision at the earliest practicable date and expedited in every way.

“(D) Section 307 (a) (relating to subpoenas) shall be applicable to any proceeding under this subsection.

[42 U.S.C. 1857c-5]

No. 73-1742

Supreme Court  
FILE

JUL 10 1973

MICHAEL RUBAK, JR.

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1973

RUSSELL E. TRAIN, ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY AND THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,  
*Petitioners,*

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC. SAVE AMERICA'S VITAL ENVIRONMENT, JANEY WEBER, AND SUSANNE ALLSTROM,  
*Respondents.*

MEMORANDUM IN REPLY TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

THOMAS B. STOEL, JR.  
(Member of the Bar of the  
Supreme Court)

RICHARD E. AYRES  
OGDEN DOREMUS

*Counsel for Respondents*

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1973

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No. 73-1742

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RUSSELL E. TRAIN, ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY AND THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,  
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v.

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**MEMORANDUM IN REPLY TO PETITION FOR A WRIT  
OF CERTIORARI TO THE UNITED STATES COURT  
OF APPEALS FOR THE FIFTH CIRCUIT**

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Respondents Natural Resources Defense Counsel, et al. (for convenience, "NRDC"), support the granting of a writ of certiorari, for the purpose of resolving a conflict among the circuits. In all other respects, the petition is without merit.

**BACKGROUND**

In enacting the Clean Air Amendments of 1970, Congress expressed its strong commitment to the goal of rapidly restoring the nation's air to healthful and en-

vironmentally beneficial quality. The new statute substantially altered the previously-prevailing distribution of responsibility for attacking this major health problem, markedly enlarging the supervisory role of the federal government over State and local efforts to abate pollution. This decision was not lightly taken. Through the 15 previous years, four separate federal statutes<sup>1</sup> had entrusted this task to the lower jurisdictions, without success. In 1970, the Congress found that, far from improving, "the air pollution problem is more severe, more pervasive, and growing at a more rapid rate" than before.<sup>2</sup>

It was thus obvious to the drafters of the 1970 legislation that a far stronger federal role was needed if the air was to become clean again. Hence large areas of regulation were exclusively entrusted to the federal EPA: for example, establishing emission standards for "new sources" of pollution, based upon the application of the best available technology (§ 111);<sup>3</sup> setting standards for sources of "hazardous pollutants" (§ 112); controlling automotive fuel additives (§ 211); and regulating emissions from new automobiles and other "mobile sources" (§ 202).

With respect to existing stationary sources of pollution, however, Congress chose not to discard totally the State and local programs that had developed under the previous legislation. Instead, the legislature undertook a creative exercise in federalism, building upon the existing organizational structure and expertise of the State

<sup>1</sup> Act of 1955, 69 Stat. 372 (1955); Clean Air Act of 1963, 77 Stat. 392 (1963); Amendments to the Clean Air Act, 79 Stat. 996 (1965); Clean Air Act of 1967, 81 Stat. 485 (1967).

<sup>2</sup> S. Rep. No. 91-1196, 91st Cong., 2d Sess. (1970) at 1.

<sup>3</sup> 42 U.S.C. § 1857c-6. Because the United States Code notation for the statute is quite clumsy, we hereafter adopt the original notation of the Act.

and local agencies, but allocating to EPA certain major functions to prevent inaction. The State and local agencies were to prepare and submit "Implementation Plans," binding themselves to a specific program of action designed to meet federally established standards for healthful air quality as expeditiously as practicable, but (subject to the two exceptions discussed below) not later than mid-1975.<sup>1</sup> The object was, as the court below correctly noted, to ensure that ambitious commitments were undertaken by the States, in order to force the development of technology and the pace of administrative action. *Natural Resources Defense Council, et al., v. Environmental Protection Agency*, (decision below) *Pet. App.* at 22a.

In view of the States' previous failure to commit themselves energetically to the needed measures, however, the legislation sharply curtailed State and local autonomy even with respect to Implementation Plans. For example, though the States were to formulate Implementation Plans, EPA was instructed to exercise a powerful supervisory role. If a State Plan failed in any respect to meet the detailed statutory blueprint of § 110(a), EPA was to disapprove it and promulgate binding federal regulations to replace the offending portion. Consistent with the new scheme, the statute also sharply curtailed the States' power to defer the implementation of their Plans. Where the States had previously exercised the power to grant a variance (or its equivalent) from their control regulations whenever a polluter could meet vaguely specified and highly discretionary standards such as "hardship," the new law substituted two carefully drawn federal procedures—"extensions" (§ 110(e)) and "postponements" (§ 110(f)). Consistent with the Congress' determination that the restoration of healthful air quality

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<sup>1</sup> § 110, 42 U.S.C. § 1857c-5. This section is reprinted, with the original notation, in Appendix C of Petitioner's Appendix at page 56a, *et seq.*

was so urgent it must take precedence over narrow economic interests, *NRDC, et al., v. EPA*, (decision below) Point V (unchallenged in the instant petition for certiorari), *Pet. App.* at 48a *et seq.*; *NRDC, et al., v. EPA*, 478 F.2d 875, at 888-9 (1st Cir., 1973), these two provisions limited the degree of flexibility and administrative discretion, while providing relief for genuine cases of inability to comply. Federal "extensions," of as much as two years, could be granted to a State or Air Quality Control Region in those few instances where, even with the application of all the available means to control pollution, an area was so polluted that healthful air quality could not be attained even by 1975. Likewise, in the unusual situation where a specific polluter could not meet the requirements of his State's Plan, the federal EPA could grant him immunity from the statute's penalties for up to one year at a time through a federal "postponement." In order to avoid the abuses associated with the State variance procedures, however, this federal variance provision was designed to force a formal demonstration, in a judicialized federal administrative hearing, that continued jeopardy of the public health was truly unavoidable, and that the continued operation of the offending source without penalty served an important public interest. Since the standard for obtaining a postponement was purposely stricter than that for obtaining State variances, the federal law pre-empted the existing State laws.

In August, 1971, the EPA Administrator promulgated regulations which were inconsistent with this provision, in that they purported to make the application of the federal postponement procedure discretionary with federal and State administrators, rather than mandatory as Congress had intended. 40 C.F.R. § 51.32(f) (formerly 42 C.F.R. § 420.32(f)). Under these regulations, a polluter would be required to seek a postponement rather

than a State or local variance only upon a finding by the State that the requested variance would prevent the attainment or maintenance of a National Air Quality Standard. When, in May of 1972, acting under this regulation, the Agency approved State Implementation Plans that would continue to authorize State variances in violation of § 110(f), NRDC, in conjunction with numerous local citizens and clean air organizations, petitioned for review of the approvals of a number of State Plans.

Beginning with the First Circuit, four federal Courts of Appeals subsequently upheld these petitioners' contention that EPA had illegally attempted to impute discretion where none had been intended. All four agreed wholeheartedly that Congress had intended to pre-empt State variance procedures. They differed on only one point: the date on which pre-emption was to occur. The Fifth Circuit, agreeing with petitioners, held that the postponement procedure was intended to pre-empt State variance procedures immediately: that is, once EPA had approved a State Plan, a polluter could be insulated from attack for violating a part of it only if he obtained a federal postponement. The First Circuit, later followed by the Eighth and Second Circuits, held that pre-emption occurred as of the date set for attainment of the National Primary Standards (mid-1975 or earlier, except in those few cases where a State had sought and obtained an extension for attainment pursuant to § 110(e)).

EPA has since stated its agreement with the First Circuit position, though it has not, more than a year after the court's decision, rescinded its illegal regulation. Thus in petitioning this Court for a writ of certiorari, the

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\* Because the statute's review provision, § 307 of the Clean Air Amendments, required a petition for review of a Plan approval to be brought in the "appropriate circuit," it appeared impossible to challenge the approvals of all deficient State variance statutes in one piece of litigation. Hence the same legal issue was brought before several federal Courts of Appeal.



Agency has presented the Court with the narrow issue of whether pre-emption has already occurred, or whether it will occur only at the attainment date.

### THE WRIT SHOULD BE GRANTED

Respondents believe the Court should grant the writ, because it presents a conflict in the circuits that should be resolved. As noted previously, the Clean Air Amendments represent a major change in governmental policy towards pollution control, intended to place public health properly in the fore. The decision to pre-empt State variance laws, substituting a federal procedure designed to be more protective of public health, is one of the lynchpins of this effort to increase the pressure to restore healthful air quality as rapidly as possible. On such an important matter of public policy, this Court should take the opportunity to resolve the conflict over precisely when the more protective federal procedure becomes effective. Furthermore, the conflicting holdings reached by the different circuits, could, in a few instances, result in uneven treatment of the affected industries.

On the merits, the Fifth Circuit's decision is incontestably the more carefully reasoned and correct. It is grounded securely in the clear language of the statute, and in extensive legislative history that plainly establishes the Congressional intent to pre-empt entirely the State law variances. By contrast, the First Circuit's decision, which the petitioners charitably characterize as "solomonesque," *Pet. for Cert.* at 7, represents a compromise between the positions of NRDC and EPA that is not supported by either the statute or its legislative history. Obviously, this summary memorandum is not appropriate for a full explication of this point, but it suffices to say that the lower court was fully aware of the ambiguous snippet of floor debate claimed by the government to support its position, *Pet. for Cert.* at 14, cor-

rectly concluding that it was neither powerful nor persuasive when ranged against the plain language of the statute and overwhelming legislative history on the other side." Likewise, the Fifth Circuit carefully considered, and repeatedly rejected, the claim that a decision in NRDC's favor would disrupt the administration of the federal program. This same claim was made before the First Circuit in opposition to the rule the Agency now says it is willing to embrace. The claim must be seen for what it is—an appeal to the lawless notion that the courts and the Congress have no power to redress illegal conduct undertaken by the executive branch.

### CONCLUSION

On the basis of the foregoing, respondents urge that the Court grant the petition for certiorari, in order to resolve the conflict among the circuits.

Respectfully submitted,

/s/ Thomas B. Stoel, Jr.  
 THOMAS B. STOEL, JR.  
 (Member of the Bar of the  
 Supreme Court)

/s/ Richard E. Ayres  
 RICHARD E. AYRES

/s/ Ogden Doremus  
 OGDEN DOREMUS

*Counsel for Respondents*

July 8, 1974

"The petitioner's suggestion that the quoted statement by Senator Muskie is the "only relevant legislative history" is simply and woefully in error.

No. 73-1742

Supreme Court, U. S.  
FILED

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WICHITA, KAN., JR., CLERK

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

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**RUSSELL E. TRAIN, ADMINISTRATOR, UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY, PETITIONER**

**vs.**

**NATURAL RESOURCES DEFENSE COUNCIL, INC.,  
RESPONDENT**

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**AMICUS CURIAE BRIEF OF THE STATE OF TEXAS**

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No. 73-1742

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IN THE  
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RESPONDENT

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AMICUS CURIAE BRIEF OF THE STATE OF TEXAS  
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## INTEREST OF AMICUS CURIAE

The State of Texas, through the Texas Air Control Board, is responsible for implementing the federal Clean Air Act in Texas. The Board, pursuant to the provisions of the Texas Clean Air Act, utilizes a variance procedure similar to the Georgia variance procedure disallowed by the Fifth Circuit in the instant case. Under this procedure the Board has issued a number of variances allowing extensions of compliance deadlines for various lengths of time up to May 31, 1975. The Board has received notice under the Clean Air Act citizen suit provision that the validity of these variances will be challenged on the basis of the Fifth Circuit's decision.<sup>1</sup> Therefore, the State of Texas is critically concerned with the Court's resolution of this case.

## ARGUMENT AND AUTHORITIES

### (a) *Introduction*

The Clean Air Act, 42 U.S.C. § 1857c-5(a), provides that the states shall submit implementation plans to the Environmental Protection Agency which provide for the maintenance, implementation and enforcement of the national primary ambient air quality standards "as expeditiously as practicable". Pursuant to EPA's implementation plan regulations, the Texas Air Control Board submitted a plan that called for a compliance date of December 31,

<sup>1</sup>A copy of this notice is provided as Appendix I.



1973. The plan clearly indicated that the compliance date was selected with the understanding that a small number of sources would be unable to achieve compliance by that date. These sources, it was understood, would utilize the variance procedures contained in the Texas Clean Air Act, which was submitted and approved as a part of the state's implementation plan.

It is important, in evaluating the arguments presented by the *amicus* and the Fifth Circuit's decision, to understand the actual operation of the variance procedure in Texas. To begin with, the Texas Clean Air Act authorizes variances in strictly limited situations. Only if the denial of a variance would result in (a) the arbitrary and unreasonable taking of property or (b) the practical closing of a lawful business can a variance be granted. These limited statutory provisions account for the extremely small number of variances currently outstanding in the State of Texas. Of approximately 3,000 air pollution sources in Texas, only thirteen have been issued variances. Further, these variances, based upon an administrative record after ex-

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<sup>2</sup>Section 3.21 of the Texas Clean Air Act, TEX. REV. CIV. STAT. ANN. art. 4477-5 (Supp. 1974), provides:

The board may grant individual variances beyond the limitations prescribed in this Act or in the rules and regulations of the board whenever it is found, upon presentation of adequate proof, that compliance with any provision of this Act, or any rule or regulation of the board, will result in an arbitrary and unreasonable taking of property, or in the practical closing and elimination of any lawful business, occupation or activity, in either case without sufficient corresponding benefit or advantage to the people . . . .

haustive public hearings, generally impose stringent interim compliance schedules.

Texas therefore believes that the position taken by the First, Second, and Eighth Circuit Courts of Appeals and by EPA, allowing the granting of state variances in the period before the attainment date for national ambient air standards, achieves the goals of Congress and does so "as expeditiously as practicable".

- (b) *The Fifth Circuit's construction of § 1857c-5(f) as the exclusive means of granting variances under the Clean Air Act deprives the states of flexibility necessary to implement their plans and is contrary to Congressional intent.*

In construing the pertinent provisions of the Clean Air Act involved in this case, it is important that the meaning and intent of the whole statute be considered. As this Court stated in *Richards v. United States*:

We believe it fundamental that a section of a statute should not be read in isolation from the context of the whole Act, and that in fulfilling our responsibility in interpreting legislation "we must not be guided by a single sentence or member of a sentence, but [should] look to the provisions of the whole law, and to its object and policy." 369 U.S. 1, 11 (1962)

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<sup>3</sup>*Natural Resources Defense Council v. Environmental Protection Agency*, 494 F.2d 519 (2nd Cir. 1974); *Natural Resources Defense Council v. Environmental Protection Agency*, 483 F.2d 690 (8th Cir. 1973); *Natural Resources Defense Council v. Environmental Protection Agency*, 478 F.2d 875 (1st Cir. 1973).

As shown below, the Fifth Circuit's mechanistic construction of § 1857c-5(f) vesting the Administrator of EPA with the exclusive authority to grant extensions of compliance deadlines, does violence to the goals and overall operation of the Clean Air Act.

First, the Act places the duty of controlling air pollution at its source not on the Administrator, but squarely on the states. 42 U.S.C. § 1857(a)(3) specifically states that "the prevention and control of air pollution at its source is the primary responsibility of the states and local governments"; the federal role, given a sound and well administered implementation plan, is essentially one of oversight. Consistent with this policy of state primacy, the Act requires the states, not the Administrator, to prepare and implement a plan to achieve the national ambient air quality standards established by EPA. Section 1857c-5(a)(2)(A) allows the state considerable flexibility in the attainment of these standards. The state is allowed to pick any date, up to three years after the plan's approval—i.e., before May 31, 1975 — which will achieve compliance with national primary standards "as expeditiously as practicable." As noted earlier, Texas chose December 31, 1973, as the compliance date for the regulations contained in its implementation plan, concluding that all but a handful of the 3,000 sources in the state could comply by that date and that the non-compliant few would be placed on abatement schedules via the state variance procedure and submitted to EPA as revisions or modifications of the plan.

If the procedure mandated by 42 U.S.C. § 1857c-5(f) were the only means of issuing variances from the state selected compliance dates in state implementation plans, not only would the Act's policy of state primacy in air pollution regulation be violated, but the Congressional goal of achieving the national ambient air standards as expeditiously as practicable would be frustrated. A state, unable to impose compliance schedules through a variance procedure on *certain* individual sources, might well postpone the compliance deadline for *all* sources. Congress surely cannot have intended such an anomalous result, yet this is precisely the result fostered by the decision of the Fifth Circuit. The First Circuit, by contrast, recognized the problem and concluded quite correctly that the Act

"... permitt[ed] a state to impose strict emission limitations now, subject to individual exemptions if practicability warrants; otherwise it may be forced to adopt less stringent limitations in order to accommodate those who, notwithstanding reasonable efforts, are as yet unable to comply."

478 F.2d at 887.

- (c) *Section 1857c-5(a)(3) authorizes the Administrator of EPA to allow state variance programs.*

Section 1857c-5(a)(3) provides that the Administrator of the Environmental Protection Agency "shall approve any *revision* of an implementation plan applicable to an air quality control region if he determines that it meets the requirements of paragraph (2) and has been adopted by the state after reasonable notice and public hearings." (Em-

phasis added.) The provisions in paragraph (2) are those same general requirements laid out for the state implementation plan.

The plain language of this section would seem to authorize the Administrator to approve state-issued variances as revisions to the implementation plan as long as they otherwise complied with the Act. Such variances, imposing compliance schedules different from that generally required in the implementation plan as originally submitted to and approved by EPA, would obviously constitute "changes" or "modifications" of the plan, terms which are commonly equated with the word "revision".<sup>4</sup>

The Fifth Circuit arbitrarily rejected this common sense approach and, without citation of authority, blandly concluded that "[a] revision is a change in a generally applicable requirement . . . [while a] variance [is] a change in the application of a requirement to a particular party." 489 F.2d at 401. While this distinction may be "familiar and clear" to the Fifth Circuit, your *amicus* finds it remarkably novel. Not only does it fail of any linguistic or semantical sense, it does not particularly serve the purposes of the Act.

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<sup>4</sup>See definitions of "revise" and "revision" in WEBSTER'S THIRD INTERNATIONAL DICTIONARY (1969) at p. 1944, and in THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (1969) at p. 1112.

This Court has held that in the absence of persuasive reasons to the contrary, the words of a statute will be given their ordinary meaning. *Bank v. Chicago Grain Trimmers Ass'n, Inc.*, 390 U.S. 459, 465, (1968). *Commissioner v. Brown*, 380 U.S. 563 (1965) (departure from ordinary meaning justified only to avoid absurd results).

Consider the following hypothetical: A state has concluded that one of only two sources of a given pollutant in a given air quality control region in the state cannot meet the general compliance deadline set forth in the implementation plan approved by EPA, but that the other source can. The state has also concluded, however, that within six months the non-compliant source can install the necessary abatement equipment to meet the regulation and that the combined contribution of the two sources in the meantime will not result in a violation of the EPA-set ambient air standard for that pollutant in that region. The state, it would seem, short of completely shutting the plant down, with the accompanying economic hardship and dislocation, has two alternatives: (a) it can issue a variance to the non-compliant source requiring that it install the necessary equipment and be in compliance in six months; or (b) it can redraw the regulation itself in such a fashion that the non-compliant source can comply. This could be done, for example, by dropping the sampling technique which causes the source to read in violation of the regulation, leaving in effect only those sampling procedures which do not yield violations.<sup>5</sup> Alternatives (a) and (b) would each effective-

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<sup>5</sup>A convenient example is the "opacity" sampling procedure for measuring the emission of particulates. Under this procedure a trained observer "reads" the plume coming from a source to see to what percentage degree it obscures visibility. The test is designed to control easily respirable and hence more dangerous small particles of matter. Many industries contend that, while they cannot comply with opacity measurements, they can meet the other two common tests of particulate emission—in stack concentration and property line concentration. These methods, however, rely on the weight of the particles and thus do not effectively meet the small particle problem.

ly exempt the non-compliant source, but only (a) would violate the Fifth Circuit's rationale and hence require rejection by the Administrator. Alternative (b) would seemingly pass Fifth Circuit muster, since it is a "change in a generally applicable requirement." 489 F.2d at 401. As long as alternative (b) otherwise complied with § 1857c-5(a)(3), it would be approvable thereunder.

In short, the Fifth Circuit's "distinction" between *revision* and *variance* is, in the true sense of the phrase, a distinction without a difference.<sup>6</sup> What really matters is not so much the form in which the state deals with the problems that arise in the practical administration of its implementation plan, but rather whether the method chosen will achieve compliance "as expeditiously as practicable" as required by the Act.

### CONCLUSION

The decision of the Fifth Circuit is without foundation in law or logic. Not only does it contravene the Clean Air Act's policy of state primacy in the regulation of air pollution at its source, discourage the states from setting early dates for compliance with their implementation plans, and subvert the ordinary meaning of the words Congress chose in writing the Act, the decision also is in direct conflict with

<sup>6</sup>This is, of course, not quite accurate. There is a substantial, deleterious difference between alternatives (a) and (b) in the hypothetical discussed in the text. While alternative (a), the variance given to the one non-compliant source, ensures that the compliant source maintains the low level of emissions required by the general regulation, alternative (b), the regulation amendment method, permits the compliant source to increase emission levels.

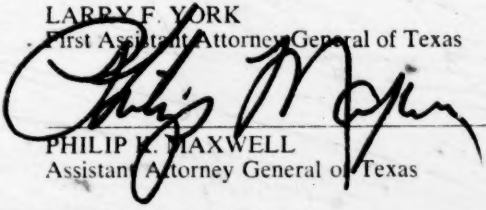
the interpretation placed on the Act, by the agency entrusted with its enforcement. As this Court noted in *Udall v. Tallman*, 380 U.S. 1 (1965), an agency's interpretation of the statute it administers is entitled to great weight and should be respected by the courts if reasonable. As Texas has shown, allowing the states to deal with isolated instances of non-compliant sources through a variance procedure, with EPA exercising its rightful role as arbiter of whether any given variance/revision meets the requirements of the Act, is an eminently workable and reasonable construction of the Act.

The decision of the Fifth Circuit should be reversed.

Respectfully submitted,

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Attorney General of Texas

LARRY F. YORK  
First Assistant Attorney General of Texas



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It should be noted that the Administrator's approval of any "revision" of a state implementation plan can be subjected to judicial review under 42 U.S.C. § 1857h-5(b)(1).

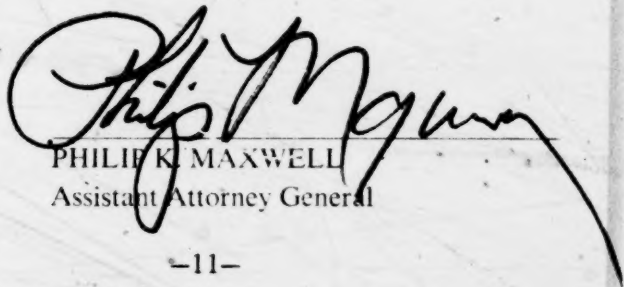


## PROOF OF SERVICE

I, Philip K. Maxwell, one of the attorneys for the State of Texas, *amicus* herein, and a member of the Bar of the United States Supreme Court, hereby certify that, on the 22nd day of November, 1974, I served copies of the foregoing brief to the Supreme Court of the United States and on the several parties thereto as follows:

1. On Russell E. Train, by mailing a copy in a duly addressed envelope, with air mail postage prepaid, to Robert H. Bork, Solicitor General, Wallace H. Johnson, Assistant Attorney General, Edmund W. Kitch, Assistant to the Solicitor General, Edmund B. Clark, and Henry J. Bourguignon, Attorneys, Department of Justice, Washington, D.C. 20530.

2. On the Natural Resources Defense Council, by mailing a copy in a duly addressed envelope, with air mail postage prepaid, to Richard E. Ayres, Natural Resources Defense Council, Inc., 1710 N Street, N.W., Washington, D.C. 20036.

  
PHILIP K. MAXWELL  
Assistant Attorney General

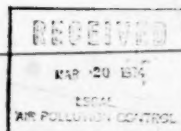
APPENDIX 1

MAIL OFFICES OF  
J. Raymond Needham  
OLD EDITION EXCHANGE  
802 TRAVIS STREET  
HOUSTON, TEXAS 77002  
TELEPHONE (713) 231-8101

March 19, 1974

Certified Mail No. 265266  
Return Receipt Requested

Mr. Charles R. Barden  
Executive Secretary  
Texas Air Control Board  
8520 Shoal Creek  
Austin, Texas 78758



Re: Subsection 304(b) of the Clean  
Air Act (Sec. 12, Public Law  
91-604; 84 Stat. 1706, 42 U.S.C.  
91-604; 84 Stat. 1706, 42 U.S.C.  
Section 1851, et seq.)

Dear Mr. Barden:

Pursuant to the provision of Subsection 304(b) of The Clean  
Air Act (Sec. 12, Public Law 91-604; 84 Stat. 1706, 42 U.S.C.  
Section 1851, et seq.), Sharon E. Gorman and other persons,  
citizens of the United States and the State of Texas, hereby  
serve the attached Notice as a prerequisite to commencement  
of a civil action under the above statute.

Very truly,  
  
J. Raymond Needham

Enclosure

Enclosure

cc: Mr. Terence L. O'Rourke  
Assistant Attorney General of Texas  
One Main Plaza, Suite 325  
Houston, Texas 77002

## NOTICE

That

SHARON E. GORMAN  
#4 BAY VILLA  
BAYTOWN, TEXAS 77520

and other persons,

citizens of the United States of America and State of Texas,  
pursuant to subsection 304(b) of the Clean Air Act (Sec. 12,  
Public Law 91-604; 84 Stat. 1706, 42 U.S.C. §§ 1857 et seq) and  
40 C.F.R. 54: 36 F.R. 23386, December 9, 1971, hereby give notice  
as a prerequisite to the commencement of a civil action to en-  
force the law and will show in the appropriate United States  
Courts as follows:

### I.

That, the Administrator of the Environmental Protection  
Agency approved the State of Texas's plan for achieving the federal  
ambient air quality standards under the Clean Air Act Amendments  
of 1970. And that said plan allows Texas officials to grant variances  
from particular requirements of the plan. And that the plan di-  
rects Texas officials to take into account economic impact and tech-  
nological feasibility in the discharge of their duties under the  
Texas Clean Air Act, (Article 4477-5, sec. 3.13 VACCS).

### II.

That, the Texas Air Control Board has granted variances  
from the particular requirements of the Texas Clean Air Act and  
rules, regulations and orders of said Board. That said variances  
are contrary to the requirements of the implementation plan  
prescribed by the Federal Clean Air Act.

### III.

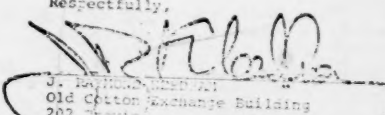
That certain corporations doing business in the State of Texas  
[the names of which are attached hereto as appendix A] from and

after January 1, 1974, and each and every day thereafter have emitted and continue to emit air contaminants into the atmosphere so as to violate the emission standards and limitations required by the Texas Clean Air Act and Rules and Regulations adopted by the Texas Air Control Board, under variances issued by the Texas Air Control Board. And that said emissions into the atmosphere are unlawful.

IV.

That under the case of the Natural Resources Defense Council v. Environmental Protection Agency, Civil No. 72-2402, (5th Cir., Feb. 8, 1974), the conduct of the Administrator, Texas Air Control Board, and above mentioned corporations is clearly illegal.

Respectfully,

  
J. Raymond Gorman  
Old Cotton Exchange Building  
202 Texas  
Houston, Texas 77002

Attorney for Sharon E. Gorman



NOV 22 1974

MICHAEL J. COAK, JR., CL

IN THE  
**Supreme Court of the United States**  
October Term, 1974

No. 73-1742

**RUSSELL E. TRAIN, ADMINISTRATOR,  
UNITED STATES ENVIRONMENTAL  
PROTECTION AGENCY, and the UNITED  
STATES ENVIRONMENTAL PROTECTION  
AGENCY, Petitioners**

v.

**NATURAL RESOURCES DEFENSE COUNCIL,  
INC., ET AL., Respondent**

**BRIEF AMICUS CURIAE**

OF

**EXXON CORPORATION  
SHELL OIL COMPANY  
CELANESE CORPORATION  
MOBIL CHEMICAL CO.  
UNION OIL COMPANY  
OF CALIFORNIA  
AMERICAN PETROFINA  
COMPANY**

**GULF OIL CORPORATION  
PHILLIPS PETROLEUM CO.  
ATLANTIC RICHFIELD CO.  
CHAMPLIN PETROLEUM CO.  
ALUMINUM COMPANY OF  
AMERICA  
RIO GRANDE VALLEY  
SUGAR GROWERS ASSN.**

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IN THE  
**Supreme Court of the United States**  
October Term, 1974

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No. 73-1742

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RUSSELL E. TRAIN, ADMINISTRATOR,  
UNITED STATES ENVIRONMENTAL  
PROTECTION AGENCY, and the UNITED  
STATES ENVIRONMENTAL PROTECTION  
AGENCY, *Petitioners*

v.

NATURAL RESOURCES DEFENSE COUNCIL,  
INC., ET AL., *Respondent*

---

**BRIEF AMICUS CURIAE**

FILED ON BEHALF OF:

EXXON CORPORATION  
SHELL OIL COMPANY  
CELANESE CORPORATION  
MOBIL CHEMICAL CO.  
UNION OIL COMPANY  
OF CALIFORNIA  
AMERICAN PETROFINA  
COMPANY

GULF OIL CORPORATION  
PHILLIPS PETROLEUM CO.  
ATLANTIC RICHFIELD CO.  
CHAMPLIN PETROLEUM CO.  
ALUMINUM COMPANY OF  
AMERICA  
RIO GRANDE VALLEY  
SUGAR GROWERS ASSN.

---

**INTEREST OF AMICUS CURIAE**

The above-named companies, Exxon et al., have obtained variances from the regulations incorporated in the implementation plan for the State of Texas. Some also have variances from other State implementation plans.

10 of the 12 companies have already been given a notice under the citizen suit provision of the Clean Air Act, 42 U.S.C. § 1857h-2, that they will be sued on the basis that the variances granted to them by the Texas Air Control Board are invalid under the Fifth Circuit's decision in *Natural Resources Defense Council, Inc. v. Environmental Protection Agency*, 489 F.2d 390 (1974), and that as a consequence their emissions into the atmosphere are unlawful. A copy of this citizen suit notice is found in Appendix A. Thus, this brief, which is being filed with the consent of both parties, will present the views of companies which are *directly* affected by the outcome of this case.

### SUMMARY OF ARGUMENT

Consistent with the provisions of the Clean Air Act,<sup>1</sup> the Environmental Protection Agency (EPA) has established and applied regulations which permit the States to grant variances from their implementation plans for attaining the national ambient air quality standards where the attainment of the ambient standards by the mandatory statutory deadlines will not be affected. Such variances from the emission source standards incorporated in the implementation plans are regarded as "revisions" of the States' implementation plans under 42 U.S.C. § 1857c-5 (a)(3). The EPA's interpretation of the Act as reflected in its regulations permits the States to maintain their "primary role" in developing implementation plans by giving the States sufficient flexibility to develop control strategies which will achieve the national ambient air quality standards "as expeditiously as practicable" as required by the Act. 42 U.S.C. § 1857c-5(a)(2)(A)(i). If variances can-

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1. 77 Stat. 392, as added and amended by the Clean Air Amendments of 1970, 84 Stat. 1676, 42 U.S.C. §§ 1857 *et seq.*

not be granted and § 1857c-5(f) postponements are regarded as the sole deferral mechanism for attaining emission source standards, as has been held by the Fifth Circuit, there will be very little improvement in the ambient air quality until the latest possible time under the Act for attaining the ambient standards as the States will be forced to devise plans to overcome the limited relief available under § 1857c-5(f). Thus, the ambient standards will not be attained "as expeditiously as practicable."

Moreover, the EPA's interpretation of the Act should be upheld in view of the substantial reliance on this interpretation by the States and industry resulting in the granting of thousands of variances. If it is found that these variances are invalid, then many companies may have all or part of their facilities shutdown as a result of citizen suits or other enforcement actions, affecting not only the companies and their employees but also the economy and the energy situation. It is further submitted that Respondent, Natural Resources Defense Council, Inc. (NRDC), is estopped to challenge the EPA's interpretation of the Act under the doctrine of laches in view of the delay in challenging the EPA regulations before substantial reliance thereon by the States and industry.

## **ARGUMENT**

### **I.**

#### **The Adverse Impact of The Fifth Circuit's Decision On The States' Role in Air Pollution Abatement and On The Attainment of The Ambient Air Quality Standards**

##### **A. Role of The States Under The Clean Air Act**

The 1970 amendments to the Clean Air Act maintained state participation in air pollution prevention and control

and, in fact, mandated that the EPA cooperate with local authorities, stating that the "primary responsibility" for assuring air quality still remained with State and local governments.<sup>2</sup> While Federal funding and guidance were provided,<sup>3</sup> the Congress, realizing that air pollution was a diverse and complex problem, left it to the States to develop implementation plans, subject to EPA approval, that would result in the attainment and maintenance of the national ambient air quality standards.<sup>4</sup>

Section 1857c-5(a) sets forth the minimum requirements for plans developed by the States. The implementation plans must provide for the attainment of primary ambient air quality standards "as expeditiously as practicable" but in no case later than three years from the date of the approval of the plan.<sup>5</sup> Also to be included are "emission limitations, schedules, and timetables for compliance with such limitations, and such other measures as may be necessary to insure attainment and maintenance of such primary or secondary standard. . . ."<sup>6</sup>

## **B. EPA Guidelines for Implementation Plans**

Besides the general statutory provisions for State implementation plans, the EPA has established additional guidelines for the States in their "Preparation, Adoption, and Submittal of Implementation Plans."<sup>7</sup> Through these guidelines the EPA adopted a policy consistent with the statutory provisions of the Clean Air Act which allows the

2. See 42 U.S.C. §§ 1857, 1857a and 1857c-2.

3. See, such as, 42 U.S.C. §§ 1857b, 1857b-1, 1857c and 1857c-3.

4. 42 U.S.C. § 1857c-5.

5. 42 U.S.C. § 1857c-5(a)(2)(A)(i).

6. 42 U.S.C. § 1857c-5(a)(2)(B).

7. See 36 Fed. Reg. 15486 *et seq.*, August 14, 1971, as codified at 40 C.F.R. Part 51 (1973).

States to maintain their primary role in developing implementation plans for meeting the ambient air quality standards.

With respect to the one-year postponement provision, 42 U.S.C. § 1857c-5(f), the Administrator provided in his implementation plan guidelines at 40 C.F.R. § 51.32 (f):

“A State’s determination to defer the applicability of any portion(s) of the control strategy with respect to such source(s) will not necessitate a request for postponement under this section unless such deferral will prevent attainment or maintenance of a national standard within the time specified in such plan: *Provided, however*, That any such determination will be deemed a revision of an applicable plan under § 51.6.”

In other words, the requirements of § 1857c-5(f) were to apply only when the deferral of any portion of control strategy regulations would affect the attainment or maintenance of the national ambient air quality standards. Deferrals in other situations only required a revision of the implementation plan by the States in accordance with the less stringent requirements of 40 C.F.R. § 51.6 (1973).<sup>8</sup> Thus, the EPA regulation, 40 C.F.R. § 51.32 (f), provides the States with flexibility in determining how to achieve the ambient air quality standards “as expeditiously as practicable.” As will be illustrated below

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8. Although revision requirements are not as stringent as those under § 1857c-5(f), public hearings are nevertheless required for all implementation plan revisions under 40 C.F.R. § 51.6(f) (1973), and the Administrator must review a revision in the same manner as he would the initial implementation plan. See 40 C.F.R. § 51.8 (1973). Although only § 1857c-5(f) specifically requires adjudicatory hearings, the variance hearings conducted by the Texas Air Control Board pursuant to 40 C.F.R. § 51.6(f) requirements were in fact adjudicatory.

this is not the case if the decision of the Fifth Circuit is upheld and § 1857c-5(f) postponements are held to be the exclusive deferral mechanism during the pre-attainment period.<sup>9</sup>

### **C. Impact of Granting Deferrals Only Under 42 U.S.C. § 1857c-5(f)**

Pursuant to EPA's implementation plan regulations at 40 C.F.R. Part 51, the majority of the States within the Fifth Circuit adopted a control strategy which would result in the attainment of the ambient air quality standards as soon as practicable. Georgia, Alabama, Mississippi and Louisiana made their emission source regulations immediately effective, while Texas generally made its regulations effective on December 31, 1973, essentially midway during the three-year time period for meeting the primary ambient air quality standards.<sup>10</sup> Under this type of control strategy, variances from emission source regulations are to be granted to only those sources which are able to demonstrate in public hearings the necessity for deferring the applicability of a regulation. Sources which make such a showing are put on attainable but expeditious compliance schedules which are monitored by the State air pollution control agencies. This procedure enables the State agencies to bring each emission source under their immediate

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9. "Pre-attainment period" refers to the period prior to the statutory mandatory deadlines for attaining the national primary ambient air quality standards. This brief does not address the issues of post-attainment variances or source hardship considerations, which were decided by the Fifth Circuit, as the EPA's Petition for Certiorari was limited to the pre-attainment variance issue. None of the companies supporting this brief have variances extending into the post-attainment period.

10. See page 6 of EPA's Petition for a Writ of Certiorari. Only Florida made its emission source regulations effective at the latest possible time, generally mid-1975.



scrutiny and to compel each source to achieve compliance with the emission standards as soon as possible, thus resulting in the attainment of the ambient air quality standards "as expeditiously as practicable."

On the other hand, the position of the NRDC as adopted by the Fifth Circuit, if initially adopted by the EPA, would have restricted the States in the development of their implementation plans. If the States were limited in deferring the applicability of emission source regulations to the restrictive postponement requirements of § 1857c-5(f), the States undoubtedly would have established compliance dates at the latest possible time, generally mid-1975, so as to preclude the possibility of forcing the shutdown of numerous sources which, notwithstanding reasonable efforts and availability of technology, would not be able to meet the requirements of § 1857c-5(f) due to causes beyond their control.<sup>11</sup> Moreover, the one-year postponement limitation of § 1857c-5(f)<sup>12</sup> is a further reason why the States would have probably imposed compliance dates at or near the latest possible time.<sup>13</sup>

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11. To obtain postponements, sources must meet four stringent statutory requirements. One very difficult requirement for some companies is that continued operation must be demonstrated to be "essential to national security or to the public health or welfare." 42 U.S.C. § 1857c-5(f)(1)(D) For a liberal interpretation of this requirement, see *Note*, 52 Tex.L.Rev. 1217, 1224 (1974). In situations where there is a shortage of pollution abatement equipment or material, such as steel floating roofs for storage tanks, the lack of available technology requirement also could not be met. The same would hold true where force majeure situations occur, i.e., strikes, storms, fires, etc.

12. There is no language in § 1857c-5(f) indicating that multiple one-year postponements may be granted. Therefore, it is assumed, but not conceded, that the maximum postponement is one year.

13. For those sources having variances until mid-1975, as do many of the companies supporting this brief, a § 1857c-5(f) one-year post-

Besides restricting the States' flexibility in developing control strategies, the NRDC's interpretation of the Act would also be contrary to the intent of Congress in expeditiously reducing the level of pollutants in the ambient air. If Georgia, Alabama, Mississippi, Louisiana and Texas were forced to alter emission source compliance dates to minimize the number of sources which would have to be shutdown, sources which could easily comply with the emission source regulations in a relatively short time could delay installation of control equipment without violating the State regulations. Thus, the ambient air quality would be improved only at or near the latest possible time for meeting the standards rather than "as expeditiously as practicable", as required by the Clean Air Act.<sup>14</sup>

The advantages of allowing variances from emission source regulations have been recognized by the First Circuit whose opinion has been endorsed by the Eighth and Second Circuits.<sup>15</sup>

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ponement would not provide effective relief with respect to any regulation requiring compliance at a date within two years from the date of approval of the plan. Moreover, a regulation with a compliance date before the last possible time would preclude a source from obtaining a year extension beyond the mid-1975 date for attaining the ambient air quality standards.

14. In view of Congress' use of the word "practicable," the Clean Air Act should not be interpreted and applied so as to force the shutdown of any emission source making reasonable efforts to comply with applicable regulations prior to the mandatory deadlines for meeting the national primary ambient air quality standards. This is in accord with the general rule of statutory construction, long followed by this Court, that a statute susceptible of different meanings will be interpreted to avoid hardships. See *Burnet v. Guggenheim*, 288 U.S. 280, 285 (1933).

15. *Natural Resources Defense Council, Inc. v. Environmental Protection Agency*, 483 F.2d 690 (8th Cir. 1973), and *Natural Resources Defense Council, Inc. v. Environmental Protection Agency*, 494 F.2d 519 (2nd Cir. 1974).

"We can see value in permitting a state to impose strict emission limitations now, subject to individual exemptions if practicability warrants; otherwise it may be forced to adopt less stringent limitations in order to accommodate those who, notwithstanding reasonable efforts, are as yet unable to comply." *Natural Resources Defense Council, Inc. v. Environmental Protection Agency*, 478 F.2d 875, 887 (1973).

Most of the companies supporting this brief have variances from December 31, 1973 compliance date regulations until mid-1975. These companies would probably have been forced to suspend part of their operations or would have been fined in amounts up to \$50,000 per day if § 1857c-5(f) were the only deferral mechanism and the compliance dates in the Texas Regulations remained unchanged. By way of illustration, the particular situation facing one of the companies supporting this brief, Exxon, is set forth in Appendix B which includes an excerpt from Exxon's testimony presented at its variance hearing on May 4, 1973. If § 1857c-5(f) were the sole deferral mechanism, it is unlikely that Exxon could have obtained any or adequate relief to develop and install wet gas scrubbing for its fluid catalytic cracking units as more than one year was required and technology, electrostatic precipitators, was available. Thus, Exxon would have been precluded from its efforts to develop and install new and improved technology, which is contrary to the policy of the Clean Air Act to "force" technology. See *Natural Resources Defense Council, Inc. v. Environmental Protection Agency*, 489 F.2d 390, 401 (5th Cir. 1974).

In summary, EPA's approach allows the State to fulfill their "primary role" under the Clean Air Act in an active and beneficial manner. On the other hand, if the EPA had adopted the Fifth Circuit's interpretation, the States

would have been deterred from seeking the earliest possible improvement in our air resources as the more stringent § 1857c-5(f) postponement procedure would have forced the States to wait until almost all emission sources had achieved the desired emission levels before any enforcement could be commenced. This effect would be directly opposite to the Congressional mandate that the primary ambient standards be achieved "as expeditiously as possible" and would also be contrary to the obvious flexibility Congress desired to give to the States in developing their own implementation plans for achieving the ambient standards. As noted by the First Circuit, § 1857c-5(f) imposes a stricter standard than is suggested by the "as expeditiously as practicable" language of § 1857c-5(a) (2)(A)(i). *Natural Resources Defense Council, Inc. v. Environmental Protection Agency*, 478 F.2d at 887.

## II.

### **Reliance on EPA's Interpretation of The Clean Air Act and The Adverse Impacts If that Interpretation is Not Upheld**

#### **A. Reliance by The States and Industry**

As previously noted, the EPA set forth its interpretation of the § 1857c-5(f) postponement provision and its policy on the granting of variances in its regulations for the "Preparation, Adoption and Submittal of Implementation Plans." See 40 C.F.R. § 51.32(f) (1973) quoted on page 5 herein. Relying upon these regulations the States of Georgia, Alabama, Mississippi, Louisiana and Texas developed implementation plans with early compliance dates and issued over 3,000 variances.<sup>16</sup> Companies ob-

16. See pages 6 and 8 and footnote 6 of the EPA's Petition for a Writ of Certiorari.

taining variances have relied on the State plans and regulations as well as the variances issued by the State air pollution control agencies in the conduct of their business. However, if the EPA had interpreted that Act in the manner the Fifth Circuit did and the States had kept the same compliance dates for their emission source regulations, one or more companies would have undoubtedly challenged the unreasonableness of the compliance dates or the lack of any procedure for the granting of variances from these dates in view of the limited relief under § 1857c-5(f).

Therefore, in view of the great reliance upon the EPA's interpretation of the Clean Air Act as set forth in its regulations for preparation of implementation plans, this interpretation should be upheld. This Court has indicated that general reliance upon an administrative agency's interpretation of a statute should be given strong consideration in determining the proper interpretation. *Udall v. Tallman*, 380 U.S. 1, 18 (1965); *McLaren v. Fleischer*, 256 U.S. 477, 480-481 (1921).

## **B. Administrative Chaos**

If the Fifth Circuit's decision that the § 1857c-5(f) postponement procedure is the exclusive method for deferring emission source regulations is upheld, an administrative nightmare will be created by the invalidation of over 3,000 variances in just the States comprising the Fifth Circuit. For those sources with outstanding variances at the time of a decision, requests for one-year postponements under § 1857c-5(f) would have to be promptly processed to preclude enforcement via a citizen suit, as a request for a postponement does not stay the applicability of the emission source regulation. See 40 C.F.R. § 51.32(e) (1973).

In view of the adjudicatory hearing requirement as well as the specific requirements that must be considered in granting a postponement, the hearings will be very time consuming and it is unlikely that the staffs of the EPA and the State air pollution control agencies can adequately handle any more than a few § 1857c-5(f) requests within a short time.<sup>17</sup> Moreover, the adjudicatory hearings required under § 1857c-5(f) would be in many respects duplicative of previous variance hearings required by EPA procedures under 40 C.F.R. § 51.6(f) (1973).

### **C. Impact on Industry**

Even more serious than the administrative difficulties resulting from the affirmance of the Fifth Circuit's decision would be the problems facing industry. Those companies operating under variances would be immediately subject to enforcement action under the Clean Air Act. Even if the EPA in its discretion would not take legal action against those companies having variances, there is still the concern of citizen suits under 42 U.S.C. § 1857h-2. In fact, most of the companies supporting this brief were served with a notice of a citizen suit in March of 1973,<sup>18</sup> asserting that the variances issued to the companies are invalid under the Fifth Circuit's decision and that their emissions into the atmosphere are unlawful. Presumably, a suit has not been filed in view of this Court's stay of the decision of the Fifth Circuit. However, if the Fifth Circuit's decision is upheld, a citizen suit could be filed

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17. The States presumably could revise the regulations incorporated in their implementation plans but this is also a very time-consuming process which probably cannot be accomplished prior to the mandatory deadlines for meeting primary ambient standards in mid-1975.

18. This citizen suit notice is found in Appendix A.

immediately seeking to enjoin allegedly unlawful discharges of pollutants into the atmosphere. In addition, if this decision has a retroactive effect,<sup>19</sup> a suit could force the EPA Administrator to take enforcement action against these companies for fines of up to \$50,000 per day per violation. 42 U.S.C. § 1857c-8.

Suits for injunctive action would have the most serious impact as all or part of a company's operation could be shutdown until applicable emission limitations are met. This could have a disastrous impact on the company, its customers and the area economy. Such a situation could result even if § 1857c-5(f) hearings are requested since, as indicated above, such hearings may not be able to be concluded promptly. Moreover, some companies may not be able to meet the stringent requirements of § 1857c-5(f) and thus would be at the mercy of regulatory agency or citizen enforcement action. This could occur in situations where technology is available but notwithstanding all reasonable efforts the necessary equipment or material cannot be obtained in time to meet the compliance date requirements.

As an illustration of the impact on one particular facility, reference is made to Appendix C which includes a portion of the testimony submitted by the Exxon Corporation with respect to their variance hearing before the Texas Air Control Board on May 4, 1973. In an effort to control particulate and sulfur oxide emissions from fluid catalytic cracking units at its Baytown, Texas refinery, Exxon developed new technology, wet gas scrubbing, to reduce emissions even further than that which would

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19. Even if the Fifth Circuit's decision is upheld, the great reliance on the EPA's interpretation of the Act should result in the decision having only a prospective effect.

be accomplished with existing technology, electrostatic precipitators.<sup>20</sup> A variance was obtained from the Texas Air Control Board on July 26, 1973 to allow Exxon time to develop and install this new wet gas scrubbing system on its fluid catalytic cracking units.

If it is held that variances cannot be issued by the States, then one fluid catalytic cracking unit at Exxon's Baytown refinery is subject to injunctive action for violation of sulfur oxide emission regulations. As indicated at page C-2 of Appendix C, the shutdown of this unit would reduce gasoline production by 3,800,000 gallons per day, which is 49% of the total capacity of the refinery, one of the largest in the country. Heating oil production would be reduced by 1,800,000 gallons per day, which is 66% of the refinery capacity, and production of other fuel products will be reduced by 340,000 gallons per day. Thus, an injunction shutting down this one unit at Exxon's refinery would have a substantial impact not only on Exxon but on the overall energy situation in this country.<sup>21</sup>

Thus, a decision resulting in the invalidation of all variances could possibly have almost disastrous consequences on the economy and the energy situation. The administrative chaos that would result if such a decision were rendered would probably prevent the EPA from providing any timely and effective relief under § 1857c-5(f). This possibly disastrous situation has resulted from the reliance of the States and affected companies on the EPA's interpretation of the Clean Air Act. Accordingly, EPA's reasonable construction of the Act should be upheld.

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20. See Appendix B for a discussion of the problem confronting Exxon.

21. A similar situation exists at Exxon's Bayway, New Jersey refinery.



## III.

**The NRDC is Estopped to Challenge The EPA's Approval of Implementation Plans Permitting the Issuance of Variances**

The EPA's interpretation of the Clean Air Act with respect to the extension of compliance dates for emission sources is set forth at 40 C.F.R. § 51.32(f), which has been previously quoted herein at page 5.<sup>22</sup> This regulation was originally promulgated by the EPA Administrator on August 14, 1971 at 36 Fed. Reg. 15494 as 42 C.F.R. § 420.32(f).<sup>23</sup> As previously indicated, this regulation and others were promulgated for the purpose of aiding the States in their preparation and development of implementation plans and were relied upon by the State of Georgia and other States with respect to the implementation plans prepared and submitted to the EPA Administrator by January 31, 1972.<sup>24</sup>

This suit originated in June of 1972 by the NRDC's filing of a Petition for Review challenging the EPA Administrator's approval of the State of Georgia's implementation plan on May 31, 1972.<sup>25</sup> The EPA Administrator's approval of the Georgia plan reflects no more than the application of his interpretation of the Clean Air Act requirements set forth in his regulations on the requirements for the preparation on such plans published in the August 14, 1971 Federal Register.<sup>26</sup> However, by the time the

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22. Footnote 31 of the Fifth Circuit's opinion identifies this section as stating EPA's "basic position." 489 F.2d at 401.

23. This regulation was eventually recodified as 40 C.F.R. § 51.32(f) on November 25, 1971 at 36 Fed. Reg. 22405.

24. See 37 Fed. Reg. 10842 *et seq.*, May 31, 1972.

25. See 37 Fed. Reg. 10859, promulgating 40 C.F.R. §§ 52.572-4. A few provisions of the plan were disapproved.

26. See 40 C.F.R. § 52.02(a) as found at 37 Fed. Reg. 10846, May 31, 1972.

NRDC filed its Petition for Review, there had been substantial reliance by the States as well as industry upon the EPA's interpretation of the Act concerning variances and § 1857c-5(f) postponements. Moreover, the Administrator's action on the plans of many States, including Texas, as set forth at 37 Fed. Reg. 10842 *et seq.*, May 31, 1972, were not challenged by the NRDC or any other party. Consequently, even greater reliance was placed by these States and the emission sources obtaining variances from these States on the EPA's interpretation of the Act.

Although the judicial review provision of the Clean Air Act, 42 U.S.C. 1857h-5(b), does not specifically relate to the EPA regulations promulgated on August 14, 1971, it is submitted that the NRDC is nevertheless estopped to challenge these regulations or their application in view of the substantial reliance on the regulations prior to the challenge. Because of this reliance by the States and industry, the overruling of the EPA's interpretation of the Act will result, as set forth in the previous section, in administrative chaos and possible severe and disastrous consequences to industry and the nation as a whole. If the NRDC had challenged the August 14, 1971 regulations promptly after their promulgation under the judicial review provisions of the Administrative Procedure Act, 5 U.S.C. §§ 701-706,<sup>27</sup> the EPA could have taken steps to preclude any substantial reliance on the regulations by the States in the development of their implementation plans.

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27. That Congress recognized the problems which would be caused by delayed challenges to actions under the Clean Air Act is witnessed by the 30-day limitation for filing Petitions for Review of the Administrator's actions. 42 U.S.C. § 1857h-2(b). It is submitted that this judicial review provision provides a guide in determining what is reasonably prompt action in challenging an action of the EPA Administrator.

This Court has recognized that a party is estopped on the grounds of laches where there is unreasonable delay in enforcing a right coupled with disadvantages to other parties. *Hays v. Port of Seattle*, 251 U.S. 233, 239 (1920); *Penn Mutual Life Insurance Co. v. City of Austin*, 168 U.S. 685, 696-701 (1898); *Triangle Improvement Council v. Ritchie*, 314 F.Supp. 20 (S.D.W.Va. 1969), aff'd 429 F.2d 423 (4th Cir. 1970), cert. den., 402 U.S. 497 (1971). Clearly the facts of this case call for the application of the doctrine of laches against the NRDC in their challenge to the EPA's interpretation of the Clean Air Act with respect to variances and § 1857c-5(f) postponements as set forth in the August 14, 1971 regulations.

### CONCLUSION

It is submitted that the EPA's interpretation of the Clean Air Act concerning the granting of variances from State implementation plans should be upheld and that the decision of the Fifth Circuit Court of Appeals holding § 1857c-5(f) to be the exclusive deferral mechanism should be reversed.

Respectfully submitted,

---

R. GORDON GOOCH  
Baker & Botts  
1701 Pennsylvania Ave., N.W.  
Washington, D. C. 20006

LARRY B. FELDCAMP  
Baker & Botts  
3000 One Shell Plaza  
Houston, Texas 77002

**CERTIFICATE OF SERVICE**

I hereby certify that three copies of the foregoing Brief Amicus Curiae have been personally delivered this 22nd day of November, 1974, to the Solicitor General, counsel for Train et al., and Thomas B. Stoel, Jr. and Richard E. Ayres, counsel for National Resources Defense Council, Inc.

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## APPENDIX A

### NOTICE

That

SHARON E. GORMAN  
#4 BAY VILLA  
BAYTOWN, TEXAS 77520

and other persons,  
citizens of the United States of America and State of  
Texas, pursuant to subsection 304(b) of the Clean Air  
Act (Sec. 12. Public Law 91-604; 84 Stat. 1706, 42  
U.S.C. §§ 1857 et seq) and 40 C.F.R. 54: 36 F.R. 23386,  
December 9, 1971, hereby give notice as a prerequisite  
to the commencement of a civil action to enforce the law  
and will show in the appropriate United States Courts as  
follows:

#### I.

That, the Administrator of the Environmental Protection Agency approved the State of Texas's plan for achieving the federal ambient air quality standards under the Clean Air Act Amendments of 1970. And that said plan allows Texas officials to grant variances from particular requirements of the plan. And that the plan directs Texas officials to take into account economic impact and technological feasibility in the discharge of their duties under the Texas Clean Air Act (Article 4477-5, sec. 3.13 VACS).

#### II.

That, the Texas Air Control Board has granted variances from the particular requirements of the Texas Clean

Air Act and rules, regulations and orders of said Board. That said variances are contrary to the requirements of the implementation plan prescribed by the Federal Clean Air Act.

III.

That certain corporations doing business in the State of Texas [the names of which are attached hereto as appendix A] from and after January 1, 1974, and each and every day thereafter have emitted and continue to emit air contaminants into the atmosphere so as to violate the emission standards and limitations required by the Texas Clean Air Act and Rules and Regulations adopted by the Texas Air Control Board, under variances issued by the Texas Air Control Board. And that said emissions into the atmosphere are unlawful.

IV.

That under the case of the *Natural Resources Defense Council v. Environmental Protection Agency*, Civil No. 72-2402 (5th Cir., Feb. 8, 1974), the conduct of the Administrator, Texas Air Control Board, and above mentioned corporations is clearly illegal.

Respectfully,

/s/ J. R. Needham

J. RAYMOND NEEDHAM  
Old Cotton Exchange Building  
202 Travis  
Houston, Texas 77002  
Attorney for Sharon E. Gorman

Alcoa (Aluminum Company of America)  
American Petrofina Company  
ASARCO (American Smelting & Refining Company)  
Celanese Corporation  
Champlin Petroleum Company  
Exxon Company U.S.A.  
Gulf Oil Company U.S.  
Mobil Chemical Company  
Phillips Petroleum Company  
Rio Grande Sugar Growers  
Texaco Incorporated  
Texas Eastern Transmission Corporation  
Union Carbide Corporation  
Union Oil Company of California

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**APPENDIX B**

**TEXAS AIR CONTROL BOARD  
PUBLIC HEARING**

**IN THE MATTER OF  
EXXON COMPANY, U. S. A.**

Houston, Texas

May 4, 1973

HEARINGS EXAMINER: Gerald R. Severson

STAFF MEMBERS PRESENT:

Tom Buckle

Tommy Ray

Sabino Gomez

\* \* \*

(Mr. Johnson speaking from p. 14-17  
of Hearing Transcript)

Mr. Johnson: \* \* \*

... As the Texas regulations on particulate emissions were finalized in early 1972, it appeared that electrostatic precipitators, which I will refer to as ESP's probably from here on, it appeared that ESP's would be marginal in their ability to meet the Texas regulations on our two cat units, marginal meaning that it was not clear if ESP's could or could not meet the regulations. The primary reason for this is that the Texas regulations include so-called condensable particulates in the definition of the regulated particulate emissions. These condensable particulates, which are



## B-2

primarily sulfates, exist in a gaseous form in the cat unit flue gas and are not removed by ESP's. We have some Vu-Graphs which I hope some of it you can see. Can you all see? Vu-Graph 1 shows the effect of condensable particulates using cat unit No. 2 as an example. The flue gas coming out of the carbon monoxide furnaces contains about 480 pounds per hour of catalyst fines and 85 to 100 pounds per hour of condensable particulates, for a total particulate emission rate of 565 to 580 pounds per hour. ESP's can remove about 92 percent of the catalyst fines but none of the condensables. Therefore the emissions after installation of ESP's would be about 40 pounds an hour of catalyst fines and 85 to 100 pounds an hour of condensables, for a particulate emission of 125 to 140 pounds per hour for an overall removal efficiency of 76 to 78 percent. The emission limit for cat unit No. 2, determined from Rule 105.1, is 140 pounds per hour, which means that ESP's would be marginal in meeting the Texas regulations on this particular unit. We determined that ESP's would also be marginal at our cat unit No. 3. The New Jersey regulations also include condensables in the regulated particulate emission, and Exxon's engineering staff at the Bayway, New Jersey refinery determined that ESP's could not meet the New Jersey regulations. Because of the inability of ESP's and other conventional technology to meet the New Jersey regulations and the fact that these technologies were marginal in Texas and in our desire to do a better job, our company in early 1972 began intensive engineering work to find a method for reducing cat unit particulate emissions that would meet the regulations. The problem with condensable particulates suggested the possibility of wet scrubbing, but we found that the wet scrubbing process had not been developed for use in cat unit service—or, to the best of our knowledge, even pilot

tested in this service. Therefore, we undertook laboratory and then pilot-scale wet gas scrubbing research and development, looking at several scrubber systems. Based on our studies of three different pilot plant installations and our engineering evaluation of other technologies, we have concluded that wet scrubbing is potentially the best method for control of cat unit emissions. Comparing our wet scrubbing research and development data with the more conventional means of cat unit emission control, namely ESP's, we have found that wet scrubbing is potentially a better process for several reasons. First, wet scrubbing is more efficient than ESP's for dry solids removal. Second, wet scrubbing removes condensable particulates while ESP's do not. Third, wet scrubbing removes sulfur dioxide while ESP's do not. Fourth, it is potentially more reliable than ESP's. The second Vu-Graph illustrates these wet scrubbing advantages, using the predicted performance of cat unit No. 2 as an example. At the top of the Vu-Graph, we have again shown the predicted particulate removal efficiencies using ESP's. Also shown are the approximate  $\text{SO}_2$  emissions from our CO furnaces. Note that ESP's do not remove  $\text{SO}_2$ . At the bottom of the Vu-Graph is the predicted performance of wet gas scrubbing, which we have abbreviated WGS. Catalyst removal efficiencies are in the range of 92 to 97 percent; condensable removal efficiencies, 70 to 90 percent, for an overall removal efficiency of 88 to 96 percent. Total particulate emissions are expected to be 25 to 70 pounds per hours, compared with 125 to 140 for ESP's. Also note that  $\text{SO}_2$  removal efficiencies are in the range of 90 to 95 percent. \* \* \*

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**APPENDIX C**

Exxon Company, U.S.A.  
Post Office Box 3950  
Baytown, Texas 77520

Refining Department  
Baytown Refinery

E. T. Di Corcia  
Manager

May 10, 1973

Additional Testimony  
Texas Air Control Board  
Hearing On Compliance Status  
File: M.73 10-9-3(8)

Mr. Jerry Severson, Hearing Examiner  
Texas Air Control Board  
820 East 53rd Street  
Austin, Texas 78751

Dear Mr. Severson:

In order to supplement the information we presented at the May 4, 1973, Texas Air Control Board public hearing on the compliance status of Exxon Company, U.S.A. with respect to Regulations I and V, we are enclosing additional testimony to be submitted into the hearing record.

This information has been notarized as is required for submission into the hearing record.

If you have questions concerning this statement, please contact Mr. J. M. Johnson at Area Code 713. 427-5711, Extension 3159.

Very truly yours,  
/s/ E. T. DI CORCIA

:jaa

A Division of Exxon Corporation

ADDITIONAL TESTIMONY—TEXAS AIR  
CONTROL BOARD HEARING ON  
COMPLIANCE STATUS

\* \* \*

Economic Impact of Shutting Down FCCUs

We considered two cases in making the evaluation—shutting down both FCCUs during January 1974 and shutting down FCCU No. 3 from February 1974 to August 1975.

Shutting down both FCCU No. 3 and FCCU No. 2 during January 1974 would shut down most of the Refinery. Assuming that we would not lay off our 2,000 employees during this period, the economic loss would be \$8,500,000. Gasoline production would be reduced by 6,900,000 gallons/day or 89 percent of refinery capacity. Heating oil production would drop 2,200,000 gallons/day (83 percent of capacity). Other fuel products would drop by 670,000 gallons per day.

The effect of shutting down FCCU No. 3 alone from February 1974 until August 1975, when wet gas scrubbing should be in operation, is also drastic. The total economic loss for this time period would be \$80,000,000. Gasoline production would be reduced by 3,800,000 gallons per day (49 percent of total capacity); heating oil would be reduced by 1,800,000 gallons per day (66 percent of capacity); and other fuel products would be reduced by 340,000 gallons per day.

\* \* \*

Supreme Court, U. S.  
FILED,

NOV 29 1974

MICHAEL RODAK, JR., CLERK

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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1974

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No. 73-1742

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RUSSELL E. TRAIN, ADMINISTRATOR, UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY, AND UNITED  
STATES ENVIRONMENTAL PROTECTION AGENCY,  
*Petitioners*

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL.

---

On Writ of Certiorari to the United States Court of Appeals  
for the Fifth Circuit

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**BRIEF OF THE AMERICAN IRON AND STEEL  
INSTITUTE AS AMICUS CURIAE**

---

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v.

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On Writ of Certiorari to the United States Court of Appeals  
for the Fifth Circuit

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**BRIEF OF THE AMERICAN IRON AND STEEL  
INSTITUTE, AS AMICUS CURIAE**

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**STATEMENT OF INTEREST**

This case involves the review of regulations of the Environmental Protection Agency [the "Agency"] establishing procedures for the approval of state im-

plementation plans under the Clean Air Act of 1970, 42 U.S.C. § 1857 *et seq.* [the "Act"] which include provisions authorizing the states to grant interim variances from state plans pursuant to the revision authority of section 110(a)(3) of the Act, 42 U.S.C. § 1857c-5(a)(3), prior to the effective date of the Act's mandatory attainment of primary ambient air quality standards. Five Circuit Courts of Appeals have reviewed this question. *Natural Resources Defense Council, Inc. v. Environmental Protection Agency*, 478 F.2d 875 (1st Cir. 1973); *Natural Resources Defense Council, Inc. v. Environmental Protection Agency*, 483 F.2d 690 (8th Cir. 1973); *Natural Resources Defense Council, Inc. v. Environmental Protection Agency*, 489 F.2d 390 (5th Cir. 1974); *Natural Resources Defense Council, Inc. v. Environmental Protection Agency*, 494 F.2d 519 (2d Cir. 1974); and *Natural Resources Defense Council, Inc. v. Environmental Protection Agency*, No. 72-2145 (9th Cir. Nov. 11, 1974). Four circuits, the First, Second, Eighth and Ninth, have upheld the Agency's authority to approve state implementation plans providing for state interim variance procedures, while one circuit, the Fifth, denied that the Agency has such authority. This Court's interpretation of the Clean Air Act in this instance will have significant impact on industry and governments at all levels by affecting substantial procedures now being followed to produce cleaner ambient air environment.

The American Iron and Steel Institute respectfully files this brief as *amici curiae* due to the concern of its members that affirmance of Fifth Circuit's decision will prohibit improved or expeditious methods of achieving the prescribed standards of the Act. Writ-

ten consent of the parties to file a brief *amicus curiae* has been obtained under Supreme Court Rule 42.2.

The American Iron and Steel Institute [hereinafter "Institute"] is a non-profit trade association incorporated under the laws of the State of New York with principal offices at 1000 Sixteenth Street, N.W., Washington, D. C. The Institute consists of 65 member companies in the United States which employ over a half million hourly and salary people, and account for more than 95 percent of the steel produced in America.

The Institute's members are and have been subject to the standards of the Act, *see, e.g.*, 40 C.F.R. §§ 60.160-60.144 (1974), and have contributed their planning and financial resources to programs premised upon the authority of the Agency to approve states' variances from previously approved state implementation plans. To disallow this authority would thwart the full thrust of the Act and cripple the intent of the Congress. Variances to implementation plans within the terms of section 110(a)(3) are essential if the combined efforts of industry and government are "to protect and enhance the quality of the nation's air resources so as to promote the public health and welfare and the productive capacity of its population". 42 U.S.C. § 1857(b)(1). Significant progress has already been made toward reaching these goals and variances have played an integral role in the planning and implementation of the Act's goals. To eliminate this useful administrative tool by preventing the revision of certain implementation plans will severely handicap the industries and governments who are compelled to meet the standards of the legislation.

Accordingly, the Institute is vitally concerned with and would be immediately affected by a decision which would deny the authority of the Agency to approve interim variances granted by the states under implementation plans developed pursuant to the Act and the Agency's regulations.

In the opinion of the members of amicus, economic, technological and practicable conditions in the iron and steel industry and the communities served by the members, generally would be best served by continuing the Agency's present procedures of approving variances in state implementation plans under the Agency's revision authority, delineated in section 110(a)(3) of the Clean Air Act. 42 U.S.C. § 1857c-5(a)(3).

## SUMMARY OF ARGUMENT

### I

The Clean Air Act requires the Environmental Protection Agency—which it already has done—to establish national primary and secondary ambient air quality standards establishing the maximum allowable concentration of pollutants in the ambient air environment.\* Subsequent to the promulgation of national standards, the states developed implementation plans pursuant to the Act which vests in them the primary responsibility for implementing and maintaining programs to meet the national ambient air quality standards. The Act provides that the Agency shall approve state plans to insure that state programs will meet national ambient standards by the deadlines established under Act, generally set for mid-1975. The Act in two sections, relevant here, provides for the approval of variances from state implementation plans. In sec-

tion 110(a)(3) the Agency is granted the authority to approve revisions in state implementation plans. 42 U.S.C. § 1857c-5(a)(3). In section 110(f) the Act provides a second type of variance in the form of postponements of up to one year in the effective date of an implementation plan. 42 U.S.C. § 1857c-5(f).

Under section 110(a)(2)(A), state plans implementing national primary air quality standards must provide "for the attainment of such primary standards as expeditiously as practicable but . . . in no case later than three years from the date of approval of such plan". 42 U.S.C. § 1857c-5(a)(2)(A). A state plan must further insure, under section 110(a)(2)(B), the maintenance of primary and secondary standards once they are reached by the state under section 110(2)(A). Thus, a state's implementation plan must provide for two periods of time: one when primary standards must be reached as expeditiously as practicable and a second when standards once attained must be maintained. In the first, or pre-attainment period, the Agency and states are given a degree of flexibility in revising state implementation plans. In the second, or post-attainment period, flexibility must give way to strict rules of compliance and variance therefrom. It is during this pre-attainment period in which the states are delegated, subject to Agency approval, the authority to grant variances in the form of revisions of state implementation plans, which has become the subject of this review. To deny the Agency's authority to grant revisions would be to severely handicap the states' ability to carry out their responsibilities as mandated by the Act. The postponement procedures, embodied in section 110(f), are applicable only to post-attainment problems, and thus are not controlling on

the Agency's authority to grant variances prior to the effective date of mandatory attainment of national ambient air quality standards.

## II

The Clean Air Act in sections 110(c) and (d) provides that the Agency's procedures for approving state implementation are to be uniform. Throughout both sections, reference is made to the state hearing procedures (and agency procedures should the state fail to hold hearings) in terms of the implementation plan or revisions. While the legislative history is silent in this area, both sections 110(c) and (d) display a clear Congressional intent that revisions and original implementation plans must be treated uniformly.

An interpretation of the Act which permits the agency to approve interim state variances is consistent with the Court's holdings that in complex areas, such as solving the national air pollution control problem, federal agencies must have the flexibility to grant variances within the meaning of the relevant statutes. In the case of pre-attainment variances, judicial construction, tempered by reasonableness, must be applied to section 110 in order to insure flexibility by providing the Agency with the authority to approve state variances prior to the effective date of mandatory national ambient air quality deadlines. *United States v. Allegheny Ludlum Steel Corp.*, 406 U.S. 742 (1972).

## III

The objectives of the Clean Air Act are best encouraged by upholding the Agency's authority to approve state implementation plans which provide for interim variance prior to the effective date of mandatory attainment standards. This conclusion is based on two overriding premises. First, as the four circuits sup-



porting the agency noted, the Agency's revision procedures encourage the states to impose strict air quality limitations now, subject to individual exceptions if warranted. If the revision power is unavailable, and only the postponement procedures of section 110(f) are applicable, the states would be forced to adopt less stringent standards in order to accommodate those who could not otherwise comply, notwithstanding reasonable efforts.

Second, the states and the Agency have been proceeding since enactment of the Clean Air Act under the assumption that the revision authority would be available and utilized. For the revision procedures now to be unavailable on the eve of the effective date of mandatory standards (generally set for mid-1975) would be to disrupt the entire environmental program by calling into question the delicate balance between state and federal roles. Moreover, unavailability of the revision procedures would cause irreparable injury to industries which have been striving, under state plans and revisions thereto, to meet the mandatory attainment deadlines.

## ARGUMENTS

### **I. The States Are Not Pre-empted by the Clean Air Act from Granting Interim Variances Under the Act's Revision Authority Prior to the Effective Date of Mandatory Attainment Deadlines.**

The Clean Air Act of 1970, 42 U.S.C. § 1857c-3 *et seq.*,<sup>1</sup> establishes a program of air pollution control involving three major stages. The first stage is the establishment of "ambient air quality standards", by the

<sup>1</sup> The Clean Air Act of 1970 substantially amended the Air Quality Act of 1967, 42 U.S.C. § 1857.

Agency designating the maximum tolerable concentrations of pollutants in the ambient air.<sup>2</sup> The second stage is the state development of plans to bring the states up to the national standards. State plans are subject to approval by the Agency. To be approved an implementation plan must provide for the attainment of primary standards "as expeditiously as practicable" but in no case later than three years from the date of approval of such plan, and the attainment of secondary standards within a "reasonable time". 42 U.S.C. § 1857e-5(a)(A)(i) and (ii). In approving a plan the agency must further take into consideration such other factors as *inter alia* monitoring systems land use and transportation control, not relevant here. During this second stage the Act provides that the agency shall approve revisions of a state plan if it meets the requirements set forth for an original implementation plan. 42 U.S.C. § 1857e-5(a)(3).

The third stage under the Act is the maintenance of ambient air quality standards after the effective date of mandatory deadlines. The deadline for state attainment of national standards may be postponed at the request of a state governor. The Agency may grant a postponement only after the holding of an adjudicatory

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<sup>2</sup> The Act divides the standards to be established between primary standards which are maximums allowable to protect the public health, 42 U.S.C. § 1857e-4(b)(1); and secondary standards which are maximums tolerable to protect the public welfare from any known or anticipated adverse effects. 42 U.S.C. § 1857e-4(b)(2). Section 302 of the Act defines the public welfare as:

(h) All language referring to effects on welfare includes, but is not limited to, effects on soils, water, crops, vegetation, man-made materials, animals, wildlife, weather, visibility, and climate, damage to and deterioration of property, and hazards to transportation, as well as effects on economic values and on personal comfort and well-being. 42 U.S.C. § 1857h(h).

hearing "on the record". 42 U.S.C. § 1857c-5(e) & (f). Under section 110(e) the Agency may extend the three year deadline for meeting the national primary standards for up to two years if requested by the governor when an implementation plan is submitted. 42 U.S.C. § 1857c-5(e). Section 110(f) further provides that the governor may request up until the effective date of the standard, a one year extension of the national primary standard deadline. 42 U.S.C. § 1857c-5(f).

The Act divides the responsibility for developing the programs to be applied in these three stages between the states and the federal government. In the first stage the Agency has the exclusive authority to establish national ambient air quality standards. 42 U.S.C. § 1857c-4(a). In the second stage the states have the primary authority, subject to Agency approval, to establish state implementation plans to achieve the standards set by the Agency.<sup>3</sup> 42 U.S.C. § 1857c-5(a). In the third stage the Act envisions shared responsibility between the state and federal government to insure that national standards once attained, are maintained. At this final stage, the Act provides strict limitations on exemptions to the standards of ambient quality once they have been obtained. 42 U.S.C. §§ 1857c-8 & d-1.

The Agency, as required by the Act, promulgated national ambient air quality standards on April 30,

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<sup>3</sup> That the primary responsibility for solving the air pollution problem rests in the states has been a constant premise throughout the history of Congressional legislation in this area. See, *e.g.*, Air Quality Act of 1967, Pub. L. 90-145, 42 U.S.C. § 1857; Clean Air Act Amendments of 1966, Pub. L. 89-675, 42 U.S.C. § 1857; Clean Air of 1963, Pub. L. 88-206, 77 Stat. 342; Act of 1955, 69 Stat. 322.

1971 for six categories of "criteria pollutants".<sup>4</sup> 40 C.F.R. § 50 (1972). Accordingly 40 states, including Georgia, prepared and submitted implementation plans for approval by the Agency on January 31, 1972. 42 U.S.C. § 1857e-5. On May 31, 1972, the Agency approved portions of the Georgia state plan providing for exceptions to its implementation plan to firms who could not meet the standards within the deadline established in the state plan.<sup>5</sup> The Agency's approval of this portion of the Georgia plan was made pursuant to

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<sup>4</sup> At present, there are six categories of "criteria pollutants": sulfur oxides; carbon monoxide; nitrogen dioxide; the hydrocarbons; particulate matter; and the photochemical oxidants. See 40 C.F.R. § 50 (1972).

<sup>5</sup> Variances under the State of Georgia implementation plan are controlled by GA. CODE § 88-912 which provides:

**88-912. Variances.** The Department may grant specific or general classes of variances from the particular requirements of any rule, regulation or general order to such specific source or general classes of sources of air contaminants upon such conditions as it may deem necessary to protect the public health and welfare, if it finds that strict compliance with such rule, regulation or general order is inappropriate because of conditions beyond the control of the person or classes of persons granted such variances, or because of special circumstances which would render strict compliance unreasonable, unduly burdensome, or impractical due to special physical conditions or causes, or because strict compliance would result in substantial curtailment or closing-down of one or more businesses, plants or operations, or because no alternative facility or method of handling is yet available. Such variances may be limited in time. In determining whether or not such variances shall be granted, the Department shall give consideration to the protection of the public health, safety and general welfare of the public, and weigh the equities involved and the relative advantages and disadvantages to the resident and the occupation or activity affected. Any person or persons seeking a variance shall do so by filing a petition therefor with the Director of the Department. The Director shall promptly investigate such petition and make a recommendation as to the disposition thereof. If such recommendation is against the granting of the variance, a hearing shall be held thereon

section 51.32(f) of the Agency's regulations which provides:

(f) A State's determination to defer the applicability of any portion(s) of the control strategy with respect to such source(s) will not necessitate a request for postponement under this section unless such deferral will prevent attainment or maintenance of a national standard within the time specified in such plan: *Provided, however,* That any such determination will be deemed a revision of an applicable plan under § 51.6. 40 C.F.R. § 51.32(f).<sup>6</sup>

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within 15 days after notice to the petitioner. If the recommendation of the Director is for the granting of a variance, the Department may do so without a hearing; provided, however, that upon the petition of any person aggrieved by the granting of a variance, a public hearing shall be held thereon. A variance granted may be revoked or modified by the Department after a public hearing which shall be held after giving at least 15 days prior notice. Such notice shall be served upon all persons, known to the Department, who will be subjected to greater restrictions if such variance is revoked or modified, or are likely to be affected or who have filed with the Department a written request for such notification.

<sup>6</sup> 40 C.F.R. § 51.6 provides:

(a) The plan shall be revised from time to time, as may be necessary, to take account of:

- (1) Revisions of national standards,
- (2) The availability of improved or more expeditious methods of attaining such standards, such as improved technology or emission charges or taxes, or
- (3) A finding by the Administrator that the plan is substantially inadequate to attain or maintain the national standard which it implements.

(b) The plan shall be revised within 60 days following notification by the Administrator under paragraph (a) of this section, or by such later date prescribed by the Administrator after consultation with the State.

(c) The plan may be revised from time to time consistent with the requirements applicable to implementation plans under this part.

The Fifth Circuit in overturning the Agency's approval of the Georgia plan, held that the Agency exceeded its authority in approving a plan which permitted the state to grant variances prior to the effective date of the mandatory attainment deadlines.

The gravamen of this case is whether the Clean Air Act, 42 U.S.C. § 1857 *et seq.*, delegates to the Administrator, Environmental Protection Agency, the authority under the revision provisions enumerated in section 110(a)(3) of the Act, to approve interim variances in state implementation plans, prior to the effective date of mandatory attainment deadlines. 42 U.S.C. § 1857e-5(a)(3). The Agency asserts that the revision procedures of section 110(a)(3) delegates the Agency the authority to approve state variances prior to mandatory attainment dates. On the other hand, respondent, National Resources Defense Council, Inc. ["Council"] argues that the Agency's approval of variances circumvents the provisions of section 110(f), 42 U.S.C. § 1857e-5(f). The Council contends that Congress intended section 110(f) to be the exclusive mechanism for granting variances from requirements of state implementation plans.

Thus, the pivotal question is whether states variances are controlled by section 110(a)(3) or section 110(f) of the Act.

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(d) Any revision of any regulation or any compliance schedule pursuant to paragraph (c) of this section shall be submitted to the Administrator no later than 60 days after its adoption.

(e) Revisions other than those covered by paragraphs (a) and (d) of this section shall be identified and described in the next semiannual report required by § 51.7.

(f) Any revision shall be submitted only after applicable hearing requirements of § 51.4 have been satisfied.

Section 110(a)(3) requires the Agency to approve any revision of an implementation plan if that revision meets the requirements of section 110(a)(2) and if it has been adopted by the state after reasonable notice and public hearings. Section 110(a)(3) provides:

The Administrator *shall* approve any revision of an implementation plan applicable to an air quality control region if he determines that it meets the requirements of paragraph (2) and has been adopted by the state after reasonable notice and public hearings. 42 U.S.C. § 1857c-5(a)(3) [emphasis supplied].

Section 110(a)(2) in turn provides in pertinent part:

(2) The Administrator shall, within four months after the date required for submission of a plan under paragraph (1), approve or disapprove such plan or each portion thereof. The Administrator shall approve such plan, or any portion thereof, if he determines that it was adopted after reasonable notice and hearing and that—

(A) (i) in the case of a plan implementing a national primary ambient air quality standard, it *provides for the attainment of such primary standard as expeditiously as practicable but* (subject to subsection (e) of this section) *in no case later than three years* from the date of approval of such plan (or any revision thereof to take account of a revised primary standard); and (ii) in the case of a plan implementing a national secondary ambient air quality standard, it specifies a reasonable time at which such secondary standard will be attained;

(B) it includes emission limitations, schedules, and timetables for compliance with such limitations, and such other measures as may be necessary to insure attainment and maintenance of such

primary or secondary standard, including, but not limited to, land-use and transportation controls; 42 U.S.C. § 1857e-5(a)(2) [Emphasis supplied].

On the other hand, section 110(f) establishes the standards by which postponement of an implemented plan's requirements may be granted. Postponements must be requested by the governor of the state and, if granted, may extend the compliance date up to one year. A determination to postpone the compliance date must be predicated by an adjudicatory hearing "on the record after notice to interested persons and opportunity for hearing". 42 U.S.C. § 1857e-5(f)(2)(A). Section 110(f) establishes that the following criteria must be met before a postponement can be granted:

(A) good faith efforts have been made to comply with such requirement before such date,

(B) such source (or class) is unable to comply with such requirement because the necessary technology or other alternative methods of control are not available or have not been available for a sufficient period of time,

(C) any available alternative operating procedures and interim control measures have reduced or will reduce the impact of such source on public health, and

(D) the continued operation of such source is essential to national security or to the public health or welfare.

The fundamental difference between the revision authority of section 110(a) and section 110(f) is that under section 110(a) a variance can be adopted by a state after reasonable notice and public hearings. Under section 110(f) the grant of a variance must be the subject of a full adjudicatory hearing at the federal



level. The net effect of the variance under the two sections is also quite different. A revision under section 110(a) does not extend the deadline for compliance with national ambient standards; while a postponement under section 110(f) may delay compliance with the national ambient standards for up to one year.

Pursuant to section 110(a) a state's implementation plan must provide for two periods of time: an earlier period of time during which attainment of primary standards are to be achieved as expeditiously as practicable but no later than three years from approval of state implementation plans, 42 U.S.C. § 1857e-5(a)(2) [pre-attainment period]; and a later period after which the national ambient standards, having been attained, are to be maintained [post-attainment period]. 42 U.S.C. § 1857e-5(a)(3). See, *Natural Resources Defense Council, Inc. v. Environmental Protection Agency*, *supra*, 478 F.2d 875 (1st Cir. 1973); *Natural Resources Defense Council, Inc. v. Environmental Protection Agency*, *supra*, 483 F.2d 690 (8th Cir. 1973); *Natural Resources Defense Council, Inc. v. Environmental Protection Agency*, *supra*, 494 F.2d 519 (2d Cir. 1974), *Natural Resources Defense Council, Inc. v. Environmental Protection Agency*, No. 72-2145 (9th Cir., Nov. 11, 1974).

During the pre-attainment period the states have the primary responsibilities for developing and implementing plans to meet national ambient standards. See, Remarks of Senator Copper, Senate Debate on S.4358, Sept. 21, 1970, Reprinted in S. COMM. ON PUB. WORKS, A LEGISLATIVE HISTORY OF THE CLEAN AIR AMENDMENTS, 93d Cong., 2d Sess., 259 (1974). At the pre-attainment stage the Agency's role is to supervise the states' progress towards meeting mandatory ambient deadlines.

Reliance on the revision procedures of section 110(a)(3) is consistent with the legislative scheme of the Act that the states shall play the leading role in controlling pollution.<sup>7</sup> In particular, section 110(a)(3) of the Act establishes that state and local governments have the primary responsibility in the prevention and control of air pollution at its source. 42 U.S.C. § 1857(a)(3). *See also*, 42 U.S.C. § 1857(b)(3) providing for “. . . technical and financial assistance to State and local governments in connection with the development and execution of *their* air pollution prevention and control programs . . . .” [Emphasis supplied]. Section 107(a) of the Act further provides:

Each state shall have the primary responsibility for assuring air quality within the entire geographic area comprising such state by submitting an implementation plan for such state which will specify the manner in which national primary and secondary ambient air quality standards will be achieved and maintained within each air quality control region in such state. 42 U.S.C. § 1857c-2(a).

The states are required by section 110(a)(2)(A) to develop implementation plans which provide for the attainment of primary ambient air quality standards “as expeditiously as practicable but . . . in no case later than three years from the date of approval . . .” and secondary standards “within a reasonable time”. 42 U.S.C. § 1857c-5(a)(2)(A). Generally, the deadlines set for mandatory primary standards are mid-1975. To hold that the postponement provisions of section 110(f) must apply in the pre-attainment period to state variances would require the states to meet a

<sup>7</sup> See note 3, *supra*, and accompanying text.

stricter standard than enunciated in section 110(a)(2)'s "as expeditiously as practicable" language. 42 U.S.C. § 1857e-5(a)(2). For example, if immediately after the approval of a state implementation plan, a state decided to grant a variance, the procedures of section 110(f) would permit the state to seek only a one year postponement even though under section 110(a)(2) the state has three years to comply with the implementation plan.<sup>8</sup> If section 110(f) is read to cover the pre-attainment period the Act would necessarily be internally in conflict. Thus, section 110(f) in providing for a one year postponement of the mandatory date applies only to variances pertaining after the date for attainment of the national ambient air quality standards.<sup>9</sup>

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<sup>8</sup> For example, assuming section 110(f) is the exclusive procedure for granting variances and a state, such as Georgia, implements its plan effective immediately in 1972, a source of pollution which does not comply, would be required to seek a one year postponement, expiring in 1973, two years before the mandatory deadlines. Thus the one year postponement procedure could cause a source to be in violation of the standards two years prior to the effective date of attainment deadlines.

<sup>9</sup> That section 110(f) applies only to post-attainment variances was supported by the Council before the Subcommittee on Air and Water Pollution of the Senate Committee on Public Works wherein a representative of the Council stated that section 110(f) applied to "any variance which would prevent attainment of a national standard . . . ." The Council's representative supported the Agency's regulations relating to its revision authority by commenting that assertion of that authority ". . . correctly provides that variances which do not threaten attainment of a national standard are to be considered revisions of a plan . . . ." *Hearings on Implementation of the Clean Air Act Amendments of 1970—Part I (Title I) Before the Subcommittee on Air and Water Pollution of the Senate Committee on Public Works, 92d Cong., 2d Sess., ser. no. 92-H31, p. 45 & n. 51 (statement of Richard E. Ayres).*

The only relevant legislative history to the question of the scope of section 110, is found in the Summary of the Provisions of the Conference Agreement on the Clean Air Amendments of 1970 presented by Senator Muskie, as one of the amendment's sponsors. In the Summary, the procedures of section 110(f) are described as being applicable only when the mandatory three year deadline would be affected, and not for every delay or deferral of state-imposed requirements affecting the attainment of national standards within the statutory deadlines. The Summary, in describing the procedures of section 110(e) whereby a governor may request, at the time of submitting an implementation plan, a two-year extension to the mandatory deadlines, states:

If, at the time of plan approval, it appears impossible to bring specific sources into compliance within three years, the Governor of the State may request an extension of the deadline up to two years. The Administrator must be satisfied that alternate means of achieving the standard have been considered (including closing down the source in question), that all reasonable interim measures will be applied, and that the State is justified in seeking the extension. S. COMM. ON PUBLIC WORKS, A LEGISLATIVE HISTORY OF THE CLEAN AIR AMENDMENTS OF 1970, Serial No. 93-18, 93d Cong., 2d Sess., 132 (1974).

Immediately thereafter, the Summary in describing the application of section 110(f) to the postponement of the mandatory deadline, states:

A Governor may also apply for a postponement of the deadline if, when the deadline approaches, it is impossible for a source to meet a requirement under an implementation plan, interim control meas-

ures have reduced (or will reduce) the adverse health effects of the source, and the continued operation of the source is essential to national security or the public health or welfare of that State. Such a postponement is subject to judicial review.

It is clear from even this meager legislative history that section 110(f) was intended by Congress to be applied only to requests for extension for the actual deadline; not for variances granted by the states during the period prior to attainment of national ambient air quality standards.<sup>10</sup>

**II. Original Implementation Plans Under the Clean Air Act and Revisions Thereto Are To Be Treated Uniformly by the Agency Prior to the Effective Date of Mandatory Attainment Deadlines.**

The Clean Air Act in sections 110(e) and (d) presents compelling language that Congress did not intend to draw a distinction between Agency approval of revisions under section 110(a)(3) and approval of original implementation plans under section 110(a)(1)-(2). 42 U.S.C. § 1857e-5(a)-(d). Section 110(d) defines "implementation plan" under the Act to include both the original and revisions to state plans to comply

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<sup>10</sup> The holding of the Ninth Circuit Court of Appeals supports a much broader thesis than presented here in its holding that the Agency has the authority to grant variances under the revision section 110(a)(3) even after the attainment of national ambient air quality standards. *Natural Resources Defense Council, Inc. v. Environmental Protection Agency*, No. 72-2145 (9th Cir., Nov. 11, 1974); *see also*, Comment, *Variance Procedures Under the Clean Air Act: The Need for Flexibility*, 15 Wm. & M. L. Rev. 324 (1973).

with the national ambient air quality standards. The text of section 110(d) provides:

(d) For purposes of this chapter, an applicable implementation plan is the implementation plan, *or most recent revision* thereof, which has been approved under subsection (a) of this section or promulgated under subsection (c) of this section and which implements a national primary or secondary ambient air quality standard in a State. 42 U.S.C. § 1857e-5(d). [Emphasis supplied].

Section 110(c) in relevant part also provides that initial plans and revisions shall be subject to the same procedures:

(c) The Administrator shall, after consideration of any State hearing record, promptly prepare and publish proposed regulations setting forth an implementation plan, or portion thereof, for a State . . .

. . . .  
. . . .

If such State held no public hearing associated with respect to such *plan (or revision thereof)*, the Administrator shall provide opportunity for such hearing within such State on any proposed regulation. The Administrator shall, within six months after the date required for submission of such *plan (or revision thereof)*, promulgate any such regulation unless, prior to such promulgation, such State has adopted and submitted a *plan (or revision)* which the Administrator determines to be in accordance with the requirements of this section. 42 U.S.C. § 1857e-5(c). [Emphasis supplied].

Sections 110(c) and (d) read together with sections 110(a)(3) and (2) reveal a visible legislative intent to subject both original implementation plans and re-

visions thereto to the same procedural requirements. See, *Delaware Citizens for Clean Air, Inc. v. Stauffer Chemical Co.*, Civil No. 4597 (D. Del. 1973), reported in 6 ERC 1147 (1974), while dicta to the district court's holding that it lacks jurisdiction under the Act to review revisions, stating that "Both sections 1857e-5(d) and 1857e-5(e) display clear Congressional intent to treat revisions and original plans uniformly". 6 ERC at 1149. Thus, the Act provides that implementation plans and revisions are to be adopted only after reasonable notice and public hearings at the state level, subject to Agency approval. 42 U.S.C. § 1857e-5(a)(1). While this is not an adjudicatory hearing with all the trappings of section 553 of the Administrative Procedure Act, 5 U.S.C. § 553, the hearing must nevertheless provide adequate opportunity for public participation. See, *Appalachian Power Co. v. Environmental Protection Agency*, 477 F.2d 495 (4th Cir. 1973); *Duquesne Light Co. v. Environmental Protection Agency*, 481 F.2d 1 (3rd Cir. 1973); *Anaconda Co. v. Ruckelshaus*, 482 F.2d 1301 (9th Cir. 1973). Cf. *Buckeye Power, Inc. v. Environmental Protection Agency*, 481 F.2d 162 (6th Cir. 1973).

The obligation of the state to hold hearings on implementation plans and revisions to those plans is basic to the Act's overall scheme of vesting in the states the primary responsibility for implementing and maintaining nationally established ambient air quality standards. Denial of the Agency's authority to approve interim state variances, which have been subject to public notice and hearings, cuts across the very grain of the Act's careful delegation to the states of the authority for the creation and implementation of air quality programs, and to the Agency to supervise

state compliance. Compare, 42 U.S.C. §§ 1857(a)(3), 1857c-2, 1857c-5(a)(1)(a)(2)(A)(i).

Construction of section 110(a) to authorize Agency approval of state variances plans is supported by two recent Court decisions relating to the necessity of providing variances to rules of general applicability. In *Re Permian Basin Area Cases*, 390 U.S. 747 (1968), and *United States v. Allegheny-Ludlum Steel Corp.*, 406 U.S. 742 (1972). In both cases, the Court held that federal agencies have the authority to issue exemptions or variances even if statutory authority is silent on the issue. In *Permian Basin*, *supra*, the court carefully reviewed a Federal Power Commission regulation which partially exempted several gas producers from operation of the statute. Although the court acknowledged that the rate-making provisions of the Federal Power Commission do not provide for exemptions, the court held that the grant of an exemption was within the Agency's authority.

The rationale supporting the Agency's authority to grant variances has been set forth by the court in *United States v. Allegheny Ludlum Steel Corp.*, *supra*, wherein the court in ruling on the Interstate Commerce Commission's authority to grant exemptions declared:

It is well established that an agency's authority to proceed in a complex area . . . by means of rules of general application entails a concomitant authority to provide exemption procedures in order to allow for special circumstances. 406 U.S. at 755.

See, *Portland Cement v. Ruckelshaus*, 486 F.2d 375 (D.C. Cir. 1973) and *Essex Chemical Corp. v. Ruckel-*



*shaus*, 486 F.2d 427 (D.C. Cir. 1973) applying this principle to decisions of the Environmental Protection Agency involving section 111 of the Clean Air Act. See also, *United States v. Storer Broadcasting Co.*, 351 U.S. 192, 205 (1956) and *WAIT Radio v. Federal Communications Commission*, 418 F.2d 1153 (D.C. Cir. 1969) regarding application of this principle to the Federal Communications Commission.

The District of Columbia Circuit in remanding regulations involving stationary source standards for new or modified Portland Cement plants declared:

[A] regulatory system which allows flexibility, and a lessening of firm proscriptions in a proper case, can lend strength to the system as a whole. 486 F.2d at 399.

Accord, *Essex Chemical Corp. v. Ruckelshaus*, *supra*, holding that the variance procedures of section 111 "... appear necessary to preserve the reasonableness of the standards as a whole . . . ." 486 F.2d at 433.

Flexibility in the pre-attainment stage is necessary to fulfill the statutory goal of clean air within the timetable established by the Agency under the Clean Air Act. It is this need for flexibility and its reasonableness which the First Circuit found pivotal in upholding the Agency's revision authority in the pre-attainment period. *Natural Resources Defense Council, Inc. v. Environmental Protection Agency*, *supra*, 478 F.2d at 887. This need for flexibility is supported by reading sections 110(e) and (d) as necessary to preserve the reasonableness of attaining ambient standards within the national timetable. To invoke the postponement provisions of section 110(f) as the exclusive remedy for granting variances, at this stage, would be to

choke off state and Agency efforts to solve the problems of air pollution by requiring unnecessary, lengthy and time-consuming federal adjudicatory hearings. Moreover, to deny the Agency's authority to approve variances under the revision authority would be contrary to the Court's holding in *United States v. Allegheny Ludlum Steel Corp.*, *supra*, that agencies possess the authority to grant exceptions when dealing with unusually complex problems.

**III. Improvements of Public Health and Welfare Through the Attainment of National Ambient Air Quality Standards Is Best Encouraged by Permitting the States To Grant Variances Prior to the Mandatory Attainment Deadlines.**

The First Circuit in considering the practical impact of the Agency's use of the revision authority, noted:

A state plan may well establish emission limitations or other requirements during the preliminary period which one or more sources simply cannot initially meet. A postponement under § 1857c-5(f), besides being limited to only one year, would require meeting a stricter standard than is suggested by the 'as expeditiously as practicable' language § 1857c-5(a)(2)(A). We can see value in permitting a state to impose strict emission limitations now, subject to individual exemptions if practicability warrants; otherwise it may be forced to adopt less stringent limitations in order to accommodate those who, notwithstanding reasonable efforts, are as yet unable to comply. 478 F.2d at 887.

The First Circuit's observation merits serious consideration to the practical effects of pre-attainment stage procedures to be followed in approving state variances. One of the primary concerns of the Act's sponsors was that strict state and federal plans be im-

plemented at the earliest practicable moment. In the Senate's considerations of the Report of the Conference Committee on the amendments to the Clean Air Act [H.R. 17255, 91st Cong.], Senator Muskie stated:

There was little doubt in the Senate, in September [1970], that the country was facing an air pollution crisis. Cities up and down the east coast were living under clouds of smog and daily air pollution alerts. More than 200 million tons of contaminants were being spilled into the air annually.

Unless we recognized the crisis and generated a sense of urgency, national lead times to find and apply central measures could melt away without any chance for a rational solution to the air pollution problem. S. COMM. ON PUBLIC WORKS, A LEGISLATIVE HISTORY OF THE CLEAN AIR AMENDMENTS OF 1970, Serial No. 93-18, 93d Cong., 2d Sess. 124-125 (1974).

The Agency's promulgation of 40 C.F.R. § 50.32(f) involving the revision authority should be viewed as encouraging the immediate implementation of strict ambient air quality standards. The regulations encourage the states to put into force strict standards as expeditiously as practicable, allowing exemption only for those who cannot technologically and practically meet the standards.

The Agency's revision regulations are the foundation upon which strict state implementation plans have been based. Conversely, if the postponement provisions of section 110(f) are the exclusive variance procedure, weaker state plans would have been encouraged in contravention of the Act's very *raison d'être*.

Reliance upon section 110(f) as the exclusive variance procedure would further thwart the expeditious attainment of national ambient standards, by injecting substantial delay in reaching those standards. The rationale of the District Court in *Delaware Citizens v. Stauffer Chemical*, *supra*, while dicta to the court's holding that it lacked jurisdiction to review certain acts of the Agency, is persuasive in discussing the effect of subjecting every state request for pre-attainment variances to the federal hearing provisions of section 110(f). The court declared:

If every revision in a control strategy, whether or not it will prevent attainment of the national standard by the date specified in the plan, necessitated a federal hearing and review by § c-5(f) standards, it could be expected that states would approach the setting of ambitious control strategies with great caution. Regulation 51.32(f) avoids this pitfall and, at the same time, it provides maximum state involvement in control strategy revisions which will not interfere with attainment of a national standard. 6 ERC at 1151.

The delay which would result if every state pre-attainment variance necessitated an adjudicatory hearing in the federal level would be insurmountable.<sup>11</sup>

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<sup>11</sup> For example, if the Fifth Circuit decision were upheld the Agency would arguably be required to hold formal public adjudicatory hearings for over 800 variances granted under the Georgia state plans, most of which have already been subject to a state hearing. The magnitude of the number of hearings required if multiplied by the 50 states becomes gargantuan. Moreover, the ensuing delays would thwart the Act's very purpose of implementing standards as "expeditiously as practicable". Delays in the holding of federal hearings could run into years. *See, e.g.*, Request Submitted by Governor of West Virginia under section 110(f); hearing held in January, February and October 1974, for which a decision is still pending.

Moreover, recourse to a federal adjudicatory hearing at the pre-attainment stage runs counter to the Act's goal of attaining national ambient air standards as expeditiously as possible, [42 U.S.C. § 1857e-5(a)(2)] since the result mandated by section 110(a) is postponement of the effective date of the standards for up to one year.

Concurrent with weakening state implementation plans and delaying the attainment of national ambient air quality standards, the practical effect of relying upon section 110(f) as the exclusive variance procedure, would be the disruption of current implementation programs. The states, and industry within those states, have relied upon the Agency's revision authority in planning pollution control programs. See, *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971); *Udall v. Tallman*, 380 U.S. 1 (1965) holding that where an agency interpretation has been a matter of public record and where reliance on the regulation has been at great expense, the Agency's interpretation should be given "great deference" and upheld. 401 U.S. 424, 433-434 and 380 U.S. 1, 16-18. To deny the use of the revision procedure as established by 40 C.F.R. § 51-32 in the pre-attainment period would disrupt the orderly progress now underway, to meet the national ambient air quality standards, generally set for mid-1975. The revision authority asserted here does not affect the deadline for compliance with national standards, and as such the revision authority must not be construed to proscribe approval of interim variances prior to the attainment date.

### CONCLUSION

Therefore, for the foregoing reasons, the decision of the Court of Appeals for the Fifth Circuit, as it pertains to the Agency's authority to approve state

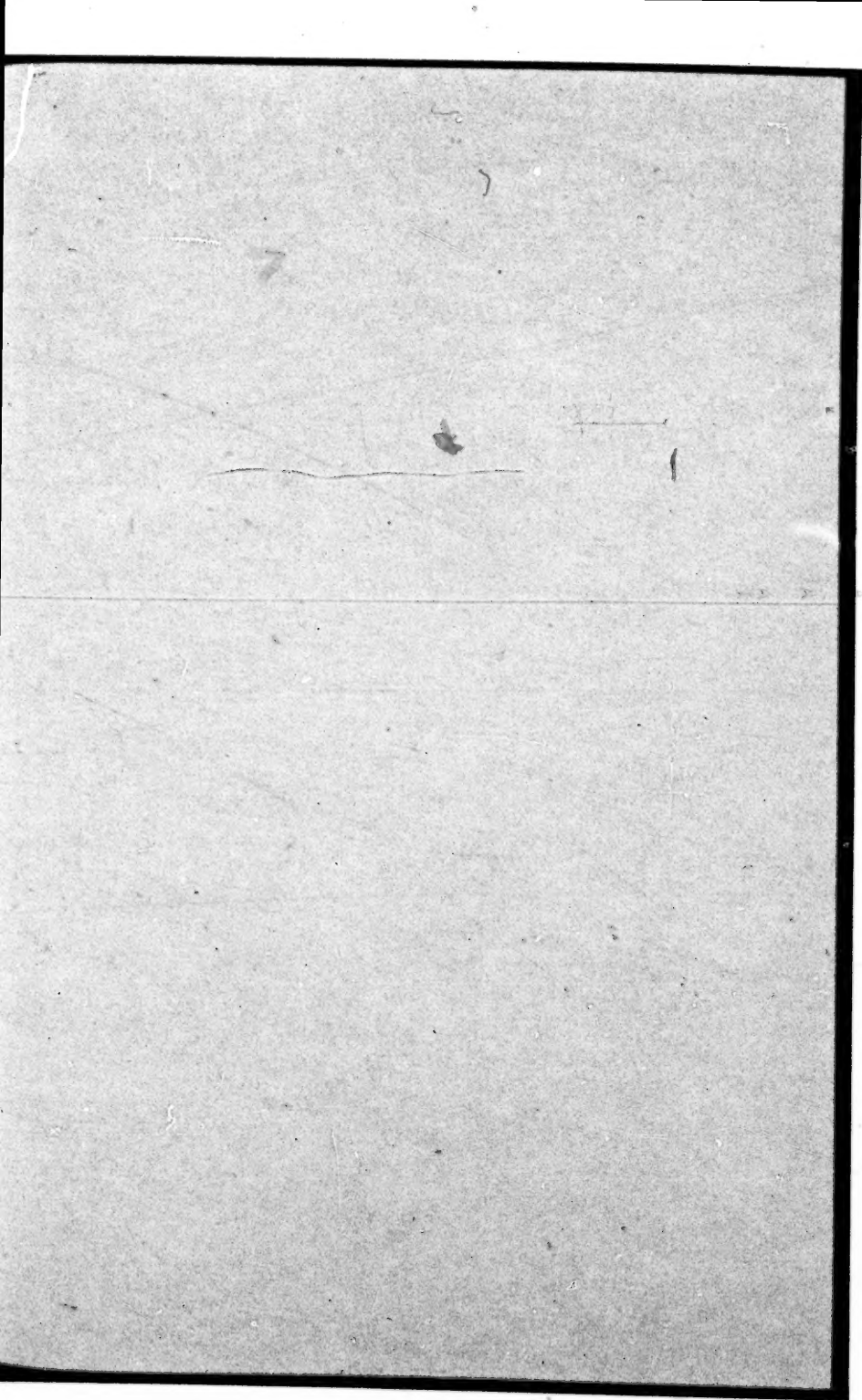
variances under section 110(a)(3), 42 U.S.C. § 1857c-5(a)(3) prior to the mandatory attainment date for national ambient air quality standards, should be reversed.

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Date: November 29, 1974



Supreme Court, U. S.  
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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1974

No. 73-1742

RUSSELL E. TRAIN, Administrator, United States Environmental Protection Agency and the UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,  
*Petitioners,*

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., SAVE AMERICA'S VITAL ENVIRONMENT, JANEY WEBER, SUSANNE ALLSTROM, *Respondents.*

On Writ of Certiorari to the United States Court of Appeals  
for the Fifth Circuit

**BRIEF OF AMICUS CURIAE  
EDISON ELECTRIC INSTITUTE**

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IN THE  
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OCTOBER TERM, 1974

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No. 73-1742

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On Writ of Certiorari to the United States Court of Appeals  
for the Fifth Circuit

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**BRIEF OF AMICUS CURIAE  
EDISON ELECTRIC INSTITUTE**

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In compliance with this Court's Rule 42, Edison Electric Institute has received the written consents of counsel for the parties to file this brief *amicus curiae*. Copies of the consents have been filed with the Clerk.

**INTEREST OF AMICUS CURIAE**

Edison Electric Institute ("EEI") is the principal national association of electric utility companies, having as its members 198 companies that supply elec-

tricity to 77.6 percent of all the electric service customers in the United States. EEI submits this brief in support of reversal of the Fifth Circuit's decision in this case.<sup>1</sup>

Member companies of EEI operate some 1800 steam-electric generating plants that are subject to regulation under the Clean Air Act ("the Act")<sup>2</sup> and the State implementation plans adopted under the Act. Those implementation plans were initially drawn up under a statutory deadline that did not permit the accumulation and evaluation of all necessary data. Accordingly, many State plans contained limitations and deadlines that were concededly arbitrary. Since both the Act and EPA regulations gave ample latitude for plan revisions, this was not considered to be detrimental where the States included procedures to revise their plans as more data became available. Under the decision below, however, such revisions are virtually ruled out.

Under the approach taken by the Fifth Circuit, plants operated by EEI member companies may be required to comply with limitations or deadlines that are wholly unrealistic and unnecessary to achieve and maintain primary and secondary ambient air quality standards under the Act. Electric rates to the con-

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<sup>1</sup> *Natural Resources Defense Council v. EPA*, 489 F.2d 1100 (5th Cir. 1974). Hereinafter "Natural Resources Defense Council" will be referred to as "NRDC."

<sup>2</sup> 42 U.S.C. § 1857 *et seq.* (1970), *as amended*, Pub. L. No. 93-319, 88 Stat. 246 (1974). For convenience, all references will be to the section numbers of the Clean Air Act rather than the United States Code; citations to both appear in the Table of Citations.

sumer have already increased dramatically as a result of inflation and soaring fuel costs. Rate increases are being sought throughout the country to finance new construction of facilities that are needed to meet future energy demands. No additional costs should be imposed on the industry and the consumer to meet pollution control requirements that go beyond those needed to protect the public health and welfare from adverse effects. The States should retain maximum flexibility, consistent with the provisions of the Act relating to implementation plans, to adjust such requirements in a realistic fashion.

Another effect of the decision below may be to force EEI member companies to use less coal and more oil or to switch from high-sulfur to low-sulfur fuels. If the States are forbidden to revise their implementation plans to permit the use of fuel on an optimum basis, the Nation's current dependence upon imported oil will only be exacerbated, and the directive of the Clean Air Act that the States achieve a level of air quality necessary to protect the public health by mid-1975 may be jeopardized.

It may be thought that the question before this Court is too narrow to evoke the concern of EEI. Since the mid-1975 deadline for compliance with National primary ambient air quality standards under the Clean Air Act is rapidly approaching, a limit on the authority of the States to grant "pre-attainment" variances (subject, of course, to EPA approval as a revision to their implementation plans) may appear to have diminishing significance. However, the rationale of the Fifth Circuit would severely restrict the authority of the States not merely to grant such "pre-attainment"

variances, but also to permit continued operation by many sources that are not interfering with primary standards. The broader implications of the decision below will continue to hamper the States long beyond 1975. Thus, the Fifth Circuit's decision is of considerable and continuing significance.

EEL urges that the decision of the lower court is neither required by the Act nor consonant with its purposes. Because of its broad impact, EEL believes that it is essential for this Court to reject the reasoning of the Fifth Circuit and reverse its holding restricting the authority of the States to adopt revisions of their air quality implementation plans.

### BACKGROUND

On December 30, 1970, the Clean Air Amendments of 1970 became law.<sup>3</sup> Those amendments restructured the Clean Air Act and established a rigorous program for the control of air pollution through the establishment and implementation of Federal primary (health-related)<sup>4</sup> and secondary (welfare-related)<sup>5</sup> ambient air quality standards.

Under section 109 of the Act, as amended in 1970, the Administrator was to promulgate standards for five pollutants, including sulfur oxides, within 120 days of enactment.<sup>6</sup>

<sup>3</sup> Pub. L. No. 91-604, 84 Stat. 1676 (1970).

<sup>4</sup> Clean Air Act § 109(b)(1).

<sup>5</sup> Clean Air Act § 109(b)(2).

<sup>6</sup> Clean Air Act § 109(a)(1)(A). Standards for six pollutants were promulgated by the Administrator on April 30, 1971. 36 Fed. Reg. 8186 (1971); 40 C.F.R. Part 50 (1973).

Section 110(a)(1) of the Act required each State to hold hearings on, adopt, and submit to the Administrator a plan which provides for implementation, maintenance, and enforcement of each Federal primary and secondary ambient air quality standard in each "air quality control region"<sup>7</sup> within the State.

The States were given nine months from the promulgation of standards to submit their plans. Section 110(a)(2) of the Act required the Administrator to "approve or disapprove" the plan within four months of submission. The Administrator was directed to approve the plan if it met eight specific statutory criteria. A plan to implement a primary standard was to provide "for the attainment of such primary standard as expeditiously as practicable but . . . in no case later than three years from the date of approval of such plan . . ."<sup>8</sup> A plan to implement a secondary standard was to specify a "reasonable time" for attainment of the secondary standard.<sup>9</sup> In addition, any plan was to include "emission limitations, schedules, and timetables for compliance with such limitations and such other measures *as may be necessary to assure the attainment and maintenance*" of Federal ambient air quality standards.<sup>10</sup>

If the Administrator disapproved the plan or any portion thereof, he was to promulgate regulations to cure the deficiency in the plan.<sup>11</sup> Following approval

<sup>7</sup> The entire geographical region of each State is divided into one or more "air quality control regions." Clean Air Act § 107.

<sup>8</sup> Clean Air Act § 110(a)(2)(A)(i).

<sup>9</sup> Clean Air Act § 110(a)(2)(A)(ii).

<sup>10</sup> Clean Air Act § 110(a)(2)(B) (emphasis added).

<sup>11</sup> Clean Air Act § 110(c).



or promulgation of a plan, section 110(a)(3) of the Act<sup>12</sup> directs the Administrator to approve any revision to a plan adopted by the State after reasonable notice and hearing that meets the requirements of section 110(a)(2). By necessary implication, so long as those requirements are met, a revision may relax, as well as tighten, specific provisions of a State implementation plan.

In addition, section 110(f) provides that "[p]rior to the date by which any source or class of sources is required to comply with any requirement of an applicable implementation plan"<sup>13</sup> the Governor of the State may apply to the Administrator "to postpone the applicability of such requirement . . . for not more than one year." To grant the postponement, the Administrator must find that:

- a. good faith efforts have been made to comply;
- b. necessary technology or alternative methods of control are not available or have not been available for a sufficient period of time;
- c. any available alternative operating procedures and interim controls have reduced or will reduce the impact of the source on the public health; and

<sup>12</sup> Throughout this brief, reference is made to section 110(a)(3). Although the section was renumbered § 110(a)(3)(A) under Pub. L. No. 93-319, 88 Stat. 256 (1974), the original section reference is used for convenience. For discussion of § 110(a)(3)(B), see p. 20 *infra*.

<sup>13</sup> Clean Air Act § 110(d) defines "an applicable implementation plan" as "the implementation plan, or most recent revision thereof, which has been approved under subsection (a) or promulgated under subsection (c) and which implements a national primary or secondary air quality standard within a state." (Emphasis added.)

- d. continued operation is essential to the national security or public health and welfare.

Public notice is required, and, if requested, an adjudicatory hearing must be conducted before a section 110(f) postponement can be granted.

In August 1971 EPA established general guidelines for preparation, adoption and submission of State implementation plans.<sup>14</sup> EPA recognized that different sources would have different impacts on ambient levels of pollutants and that the ambient levels of pollutants would vary within a region. Accordingly, the guidelines provided that the States were not required "to adopt a control strategy uniformly applicable throughout a region unless there is no satisfactory alternative way of providing for attainment and maintenance of ambient standards throughout such region."<sup>15</sup> In addition, the guidelines emphasized that the States should not adopt a control strategy without considering the "cost effectiveness" and the "social or economic impact of a control strategy."<sup>16</sup> Finally, the regulations expressly stated that the States could revise their plans to relax requirements that proved to be more stringent than the Act required.<sup>17</sup>

The task facing the EPA and the States in August 1971 was staggering. Each region had to be monitored to determine whether and where ambient standards were being exceeded; all sources of pollution had to be inventoried; diffusion models had to be prepared

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<sup>14</sup> 36 Fed. Reg. 15486 (1971).

<sup>15</sup> 36 Fed. Reg. 15487 (1971); 40 C.F.R. § 51.2(g) (1973).

<sup>16</sup> 36 Fed. Reg. 15486, 15487 (1971); 40 C.F.R. § 51.2(b) (1973).

<sup>17</sup> 36 Fed. Reg. 15494 (1971); 40 C.F.R. § 51.32(f) (1973).

to determine what controls were required to attain the standards; the social and economic impact of alternative control strategies had to be evaluated; specific controls had to be defined; schedules had to be set to achieve compliance with those controls; hearings had to be held in each State; and EPA had to review the final product to determine whether it met the requirements of the Act.<sup>18</sup> All of these steps had to be completed in less than a year.

It was simply impossible for the States to perform all of the analyses required to develop a finely-tuned regulatory program within that first year. Monitoring data on source emissions and ambient concentrations of pollutants were incomplete; there was insufficient time to inventory sources and develop diffusion models to determine which sources were contributing to violations of standards; and detailed information was not available on the feasibility of, or time required for, compliance by each source with the controls proposed by the States.<sup>19</sup> Therefore, the States took a broad-

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<sup>18</sup> See generally 116 CONG. REC. 32918 (1970) (remarks of Senator Cooper); *NRDC v. EPA*, 489 F.2d at 394; 36 Fed. Reg. 15486 (1971).

<sup>19</sup> The development of State plans to implement ambient air quality standards for nitrogen oxides provides a striking example of the imperfect nature of the plan development process. EPA's original monitoring data on nitrogen oxide concentrations disclosed violation of the standards in thirty-five States. As a result, EPA disapproved a number of State plans for their failure to impose rigid controls on nitrogen oxide emissions from stationary sources. 37 Fed. Reg. 10842 (1972). Following disapproval, EPA published proposed regulations for those plans that would have required costly modifications in existing facilities. See, e.g., 37 Fed. Reg. 11826 (1972). Prior to promulgating any of these regulations, however, EPA completed a national study of nitrogen oxide

brush approach in initially establishing control strategies. It was intended that those control strategies would be re-examined and refined later.

Most States set categorical emission limitations that applied throughout the State (or throughout a region).<sup>20</sup> In certain cases, those emission requirements were made effective immediately<sup>21</sup> while, in others, the requirements were to be effective on July 1, 1975, or some date before 1975. The States recognized, however, that such control strategies were more stringent than the Act required and therefore provided for case-by-case exceptions with the burden of proof on the source operator. Procedures were included in State plans to relax compliance dates, or even to exempt sources from the emission requirements in the plan, where compliance was not needed to attain or maintain ambient standards.<sup>22</sup> In addition, procedures were included to defer compliance where compliance was not technically or economically feasible.<sup>23</sup> Those procedures allowed the States to determine at a later date issues that could have been resolved when the plan was

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ambient levels. This study showed that nitrogen oxide standards were being exceeded in only three air quality control regions in the entire country. As a result, the EPA disapproval notices and proposed regulations were withdrawn. 39 Fed. Reg. 16344 (1974).

<sup>20</sup> 37 Fed. Reg. 10843 (1972).

<sup>21</sup> See, e.g., D.C. RULES & REGULATIONS §§ 8-2:704, 705, 706, 708, 710, 731.

<sup>22</sup> See, e.g., MICH. ADMIN. CODE R336.49. See also *Detroit Edison Co. v. EPA*, 496 F.2d 244 (6th Cir. 1974); 37 Fed. Reg. 10845-46 (1972).

<sup>23</sup> See, e.g., GEN. LAWS R.I. § 23-25-15; IOWA CODE ANN. § 136B.13; GA. CODE ANN. § 88-912.

adopted had the States had time to develop more sophisticated control strategies in the first instance.<sup>24</sup>

### ARGUMENT

The court below was one of four circuits to set aside the Administrator's approval of State "variance procedures" designed to provide relief from requirements in the State plan.<sup>25</sup> The other circuits focused on the impermissibility (except in compliance with section 110(f) of the Act) of extending compliance with requirements that were necessary to protect the public health (*i.e.*, requirements needed to attain primary standards) beyond mid-1975.<sup>26</sup> Each of those circuits recognized, however, that the States could revise their plans to change pre-1975 deadlines for compliance with such requirements upon a finding that compliance was

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<sup>24</sup> The Administrator's approval of State plans was challenged in three circuits on the ground that to comply with the control strategy set forth in the plan was not technologically or economically feasible. *Buckeye Power, Inc. v. EPA*, 481 F.2d 162 (6th Cir. 1973); *Duquesne Light Co. v. EPA*, 481 F.2d 1 (3rd Cir. 1973); *Appalachian Power Co. v. EPA*, 477 F.2d 495 (4th Cir. 1973). Each circuit held that EPA must consider the technical and economic feasibility of compliance with a control strategy in determining whether to approve a State plan. Certainly, more petitions would have been filed had not the plans included "safety valve" procedures which established a mechanism for plan revision based on specific circumstances. *See Detroit Edison*, 469 F.2d 244 (6th Cir. 1974). *Cf. United States v. Allegheny-Ludlum Steel Corp.*, 406 U.S. 742, 755 (1972); *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969).

<sup>25</sup> *NRDC v. EPA*, 494 F.2d 519 (2d Cir. 1974); *NRDC v. EPA*, 489 F.2d 390 (5th Cir. 1974); *NRDC v. EPA*, 483 F.2d 690 (8th Cir. 1973); *NRDC v. EPA*, 478 F.2d 875 (1st Cir. 1973).

<sup>26</sup> *NRDC v. EPA*, 494 F.2d at 523 (2d Cir. 1974); *NRDC v. EPA*, 483 F.2d at 693-94 (8th Cir. 1973); *NRDC v. EPA*, 478 F.2d at 887 (1st Cir. 1973).

not "practicable."<sup>27</sup> In contrast, the court below held that section 110(f) precluded any revision in State plans to change the date by which a source was required to comply with an approved emission limitation.<sup>28</sup>

Under the Fifth Circuit holding, compliance dates in the plans originally approved by the Administrator are fixed in concrete and cannot be changed even though compliance is "impracticable" or "unreasonable" or wholly unnecessary to attain and maintain ambient standards. The only relief available to the States and source operators is a "one-year postponement" under section 110(f). This is an unwarranted restriction on the authority of the States to revise their implementation plans when new evidence shows that a requirement in a plan is more stringent than the Act demands. This Court should reject the rationale of the court below that the States are precluded from adopting proposed revisions that would extend compliance deadlines in a manner consistent with section 110(a)(2) of the Act.

# I.

**Section 110(f) of the Act does not restrict the authority of the States to revise their implementation plans in accordance with section 110(a) of the Act.**

Both the language of section 110 of the Clean Air Act and its legislative history compel rejection of the holding below that Congress intended section 110(f) to preclude the States from revising State implementation plans to change compliance deadlines.

Under the Clean Air Act, primary standards must protect the "public health" with an "adequate margin

<sup>27</sup> *Id.*

<sup>28</sup> 489 F.2d at 401-03.

of safety” from the adverse effects of pollution.<sup>29</sup> Accordingly, in section 110(a), Congress directed that those standards be attained as expeditiously as practicable but not later than a fixed deadline.<sup>30</sup> Secondary standards, on the other hand, protect the “public welfare” against “any known or anticipated adverse effects” of pollution.<sup>31</sup> Because social, economic, or technological considerations may dictate delaying attainment of those standards, Congress provided that they be met within a “reasonable” time.<sup>32</sup> Primary and secondary standards together provide the degree of protection needed to avoid virtually any adverse effect from pollution. Thus, Congress only required the States to impose controls that are necessary to attain and maintain ambient standards.<sup>33</sup> Congress

<sup>29</sup> Clean Air Act § 109(b)(1). See S. REP. NO. 91-1196, 91st Cong. 2d Sess. 9-10 (1970).

<sup>30</sup> Clean Air Act § 110(a)(2)(A)(i). See 116 CONG. REC. 32901-02 (1970) (remarks of Senator Muskie).

<sup>31</sup> Clean Air Act § 109(b)(2). The “effects on welfare” are defined to include “effects on soil, water, crops, vegetation, man-made materials, animals, wildlife, weather, visibility, and climate, damage to and deterioration of property, and hazards to transportation, as well as effects on economic values and on personal comfort and wellbeing.” Clean Air Act § 302(h). See S. REP. NO. 91-1196, *supra* note 29, at 11.

<sup>32</sup> Clean Air Act § 110(a)(2)(A)(ii). See H. REP. NO. 91-1783, 91st Cong. 2d Sess. 45 (1970). 116 CONG. REC. 42384 (1970).

<sup>33</sup> Throughout the debates, State implementation plans were discussed exclusively in the context of attainment and maintenance of ambient air quality standards. 116 CONG. REC. 19200, 19204, 19205, 19206, 19207, 19209, 32918, 33116, 42382, 42384 (1970). Establishing more stringent controls was left to the discretion of the States: “[W]e say that all the states must comply with nationwide standards. We think this is the best we can do. If any state wants stronger standards, we think it will know best what it should do or how far it should go.” *Id.* at 19205 (remarks of Mr. Staggers) (emphasis added).



recognized that, as new information became available, the requirements of plans originally adopted by the States might prove to be more, or less, stringent than the Act required. As a result, the Act provides that States may revise their plans.<sup>34</sup>

In mandatory terms, section 110(a)(3) of the Act provides that the Administrator "*shall approve any revision of an implementation plan*" if it meets the requirements of section 110(a)(2) and was adopted after reasonable notice and public hearing.<sup>35</sup> Thus, the Act clearly authorizes the States to make "mid-course" corrections in their plans. Applying the criteria of section 110(a)(2), where compliance with a primary standards requirement is not "practicable," a plan may be revised to extend compliance up to the mandatory attainment date for primary standards. Similarly, where primary standards have been or will be achieved by the statutory deadline, a plan may be revised to extend compliance with any secondary standards requirement if compliance is not "reasonable." Finally, where compliance is not required to achieve either primary or secondary standards, a plan may be revised to extend compliance so long as the extension will not interfere with the maintenance of those standards. A source owner is not relieved from compliance with the original plan, of course, until the Administrator approves the revision submitted by the State

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<sup>34</sup> Clean Air Act § 110(a)(3).

<sup>35</sup> The word "shall" indicates a mandatory intent. "Shall" is the language of command. See *Escóe v. Zerbst*, 295 U.S. 490, 493 (1935). See also *Boyden v. Comm'r of Patents*, 441 F.2d 1041, 1043 n.3 (D.C. Cir. 1971); SUTHERLAND & JABEZ, STATUTES AND STATUTORY CONSTRUCTION § 2803 (3d ed. 1943).



and, by that action, changes the implementation plan itself.<sup>36</sup>

Section 110(a)(3), which allows the States to make revisions to plans, is not inconsistent with section 110(f), which allows the States to request a one-year postponement in the "applicability" of a plan requirement.

Under the Act, once an implementation plan is approved by the Administrator, the requirements in that plan have the force of law and must be complied with unless and until that plan is changed to include different requirements. Section 110(f) establishes a limited exception to this general rule under which the "applicability" of an effective plan requirement may be postponed if certain rigid criteria are met.<sup>37</sup> In this sense, the Court below was correct in stating that section 110(f) is "the exclusive mechanism for granting *variances from requirements of state implementation plans.*"<sup>38</sup> Since section 110(f) does not change the plan itself, it is proper to characterize the relief as a limited "variance" from the plan requirements. It does not follow, however, that the States may not change the compliance dates of their plans under section 110(a)(3) to establish *new plan requirements.*<sup>39</sup>

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<sup>36</sup> Under sections 113 (Federal Enforcement) and 304 (Citizens' Suits) of the Act, an enforcement action may be brought in Federal District Court for violation of any requirement in an applicable implementation plan. Changes in implementation plan requirements are not effective until they are approved by the Administrator as a revision to the plan. See Clean Air Act § 110(a)(3) and (d).

<sup>37</sup> Pp. 6-7 *supra*.

<sup>38</sup> 489 F.2d at 399.

<sup>39</sup> *Id.* at 401.

Where an existing plan is more stringent than the Act requires, a State has two choices: It may either seek a change in the plan requirement pursuant to section 110(a)(3) or it may request a one-year postponement in the plan requirement pursuant to section 110(f). Where the plan itself cannot be revised because a change would be inconsistent with the requirements of section 110(a)(2), a postponement under section 110(f) is the only relief available. Since postponement requests would usually be made where the delay would jeopardize attainment of primary standards by the statutory deadline, it is understandable that Congress set stringent criteria to restrict the use of section 110(f).<sup>40</sup>

The language of section 110(f) does not limit the authority of the States to adopt, or the duty of the Administrator to approve, any revision in a plan that satisfies the requirements of section 110(a)(2).

The court below held that the reference in section 110(f) to "*any* stationary source" and "*any* requirement of an applicable implementation plan . . . lends no basis for [a] construction" that would allow plan revisions that relax compliance dates.<sup>41</sup> However, while the Fifth Circuit was concentrating on the word "*any*", it was ignoring the statutory definition of "an

<sup>40</sup> The very structure of section 110(f) presumes a situation where primary standards are being violated. For example, the Administrator must find that "any available alternative operating procedures and interim control measures have reduced or will reduce the impact of such source on public health . . ." Clean Air Act § 110(f)(1)(C). The meager legislative history of the section discloses that it was adopted in the context of extensions in attainment of primary standards. H. REP. NO. 91-1783, *supra* note 32, at 45; 116 CONG. REC. 42384 (1970).

<sup>41</sup> 489 F.2d at 401 (emphasis in original).

applicable implementation plan." When that definition is considered, it is clear that the lower court was mistaken in concluding that plans cannot be revised to change compliance dates.

Section 110(d) defines "an applicable implementation plan" as "~~the implementation plan, or most recent revision thereof~~, which has been approved under subsection (a) or promulgated under subsection (c) and which implements a national primary or secondary ambient air quality standard within a state." Thus, the phrase "any requirement of *an applicable implementation plan*" does not limit the authority of the States and EPA to revise a plan. To the contrary, an "applicable implementation plan" expressly includes its "most recent revision . . . approved under subsection (a) . . . ."

The court below attempted to justify its interpretation of section 110 by asserting that "the procedures of section . . . [110](f) were to apply to *all* particular changes and those of section . . . [110](a)(3) to changes in rules of general application."<sup>42</sup> This unsupported assertion is then followed by a statement that "[t]here is no reason to believe that Congress intended some, indeed most, changes of a particular character should be deemed 'revisions' . . . ."<sup>43</sup> The Fifth Circuit's holding that the States cannot make "source specific" changes in their plans under section 110(a)(3) is without foundation.

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<sup>42</sup> *Id.*

<sup>43</sup> *Id.* But see note 55 *infra*.

First, the rationale of the Fifth Circuit is based on the assumption that section 110(f) establishes a procedure for "particular changes." As mentioned above, however, section 110(f) does not establish a procedure to "change" a plan; it establishes a procedure to postpone the "application" of an existing plan requirement. Thus, the conclusion that section 110(f) somehow limits the type of "changes" a State may adopt under section 110(a)(3) is premised on a false assumption.

Second, while section 110(a)(3) applies to "changes in rules of general application," there is nothing in the language of the Act to suggest that those changes cannot be of a "particular character." As mentioned above, the Act only requires the States to set limitations that are "necessary for the attainment and maintenance" of ambient standards.<sup>44</sup> EPA's regulations relating to implementation plans provide that the States are not required to establish "a control strategy uniformly applicable throughout a region *unless there is no satisfactory alternative way of providing for attainment and maintenance of ambient standards throughout such region.*"<sup>45</sup> Thus, both the Act and the regulations provide for the development of sophisticated control strategies under which different sources would meet different requirements, depending upon the impact of the source on ambient standards. Furthermore, section 110(a)(2)(B) requires that plans include "schedules and timetables for compliance" with emission limitations. The time required for a particular source to comply with an emission limita-

<sup>44</sup> Note 33 *supra*.

<sup>45</sup> 40 C.F.R. § 51.2(g) (1973).

tion will vary. Thus, this section requires (as do EPA regulations)<sup>46</sup> that plans include source specific compliance schedules and deadlines that are consistent with the statutory directives regarding attainment of ambient standards. Since the Act envisages that State plans include control strategies and schedules of a "particular character," it cannot be inferred that section 110(a)(3) precludes the States from adopting revisions of a "particular character."

Finally, the interpretation of the Fifth Circuit is inconsistent with the legislative history of section 110. That legislative history is replete with statements emphasizing the broad discretion given the States under section 110.<sup>47</sup> As Senator Muskie stated during the final debates:

[D]uring the deliberations on the bill I have been very much interested in preserving "local option" features, so that State and local authorities would be able to pursue options among a broad array, seeking a possible way of controlling or preventing air pollution that is most responsive to the nature of their air pollution problem and most responsive to their needs. In my judgment, the bill will give State and local authorities sufficient latitude in selecting ways to prevent and control air pollution.<sup>48</sup>

If a State may only make "general" changes in its plan under section 110(a)(3), it must either relax requirements for all sources in a region or not revise the plan, even though a revision is needed for only

<sup>46</sup> 40 C.F.R., § 51.15 (1973).

<sup>47</sup> See, e.g., 116 CONG. REC. 19205, 19207, 32903 (1970).

<sup>48</sup> 116 CONG. REC. 42386 (1970).

one source. Similarly, where only one source is creating a pollution problem, a State would be required to impose new and stringent requirements on all sources. Certainly, such a result does not allow the States to select the means of controlling pollution "that is most responsive to their air pollution problem and most responsive to their needs."

## II.

**Recent amendments to the Clean Air Act compel the rejection of the interpretation of the court below.**

EPA has consistently interpreted section 110(a)(3) of the Act to allow the relaxation of compliance dates for individual sources through revisions to State implementation plans.<sup>49</sup> Predicated on this interpretation of the Act, EPA, in December 1972, formulated its "clean fuels policy" under which States were encouraged to adopt source specific revisions to their plans in a manner consistent with section 110(a)(2). On August 23, 1973, EPA reiterated its policy:

States are encouraged again to consider the alternatives available to them within the framework of the Clean Air Act. Modification of unnecessarily restrictive emission regulations, *relaxation of final compliance dates for sources which need not be controlled to meet the primary standards*, and requests for postponements under section 110(f) are all mechanisms to alleviate the short-term fuels problem.<sup>50</sup>

The Fifth Circuit rejected EPA's interpretation of section 110(a)(3) and, as a result, rejected an important element of the Agency's clean fuels policy.

<sup>49</sup> 489 F.2d at 400-01.

<sup>50</sup> 38 Fed. Reg. 22736 (1973) (emphasis added). See pp. 23-24 *supra*.

Subsequent to the Fifth Circuit decision, Congress enacted the Energy Supply and Environmental Coordination Act of 1974 to deal with the national energy crisis.<sup>51</sup> Among other things, that statute amended section 110(a)(3) by adding a new subsection. The new subsection requires the Administrator to take affirmative steps to implement EPA's clean fuels policy by assisting the State to identify unnecessarily restrictive plan requirements.<sup>52</sup> Under section 110(a)(3)(B) of the Act, as amended, the Administrator is required to review each State plan and report to the State "whether . . . such plans can be revised in relation to fuel burning stationary sources (or persons supplying fuel to such sources) without interfering with the attainment and maintenance of any ambient air quality standard within the period permitted in this section."<sup>53</sup>

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<sup>51</sup> Pub. L. No. 93-319, 88 Stat. 246 (1974).

<sup>52</sup> Clean Air Act § 110(a)(3)(B), Pub. L. No. 93-319, 88 Stat. 256 (1974). The Conference Report states that the intent of this provision is "to permit a mechanism by which EPA's clean fuels policy can be implemented to the extent that States agree to do so and by which conversions to the burning of coal can be effectuated more readily consistent with requirements of the Clean Air Act." H. REP. NO. 93-1085, 93rd Cong. 2d Sess. 40 (1974).

<sup>53</sup> An earlier version of the Act would have given the Administrator even broader responsibilities and powers. The bill reported by the House Committee on Interstate and Foreign Commerce in December 1973 would have required the Administrator, not only to review State plans, but to "disapprove State plans . . . which are economically or technologically infeasible . . ." H. REP. NO. 93-710, 93rd Cong. 1st Sess. 43 (1973).

The Energy Supply and Environmental Coordination Act also amends the Clean Air Act to give the Administrator limited authority to suspend certain requirements in State implementation plans without the prior consent of the States. Clean Air Act § 119,



Thus, by its amendment, Congress has affirmed EPA's interpretation of section 110(a)(3) and has rejected the interpretation proffered by the Fifth Circuit.

### III.

**The interpretation of the court below may jeopardize attainment of primary standards and is not in the public interest.**

The decision of the court below in effect penalizes the States for initially adopting plans that were more stringent than necessary to meet primary standards by the statutory deadline or were more stringent than necessary to achieve secondary standards within a "reasonable time."<sup>54</sup> It is improper to assume, as the Fifth Circuit did, that Congress intended States to ignore changed circumstances or new information and be bound forever by decisions made in early 1972. Such an assumption has no support in the legislative history of the Act<sup>55</sup> and ignores the reality of implementation

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Pub. L. No. 93-319, 88 Stat. 248 (1974). Such authority is new. Under the Act as passed in 1970, the Administrator did not have authority to relax implementation plan requirements on his own initiative; the States either had to request a revision under section 110(a)(3) or request a one-year postponement under section 110(f).

<sup>54</sup> Certainly, such a result is not in the public interest and may encourage a far more cautious approach on the part of the States in the future.

<sup>55</sup> See notes 33, 47 & 48 *supra*. To support its interpretation, the Fifth Circuit relied on statements from the legislative history relating to the importance of meeting controls necessary to protect the "health of persons" by a fixed deadline. 489 F.2d at 401. Such statements do not, however, provide any support for the proposition that the States cannot relax requirements that prove to be *more stringent* than is necessary to achieve primary standards by the statutory deadline. The court also relied on the legislative history of section 202 of the Act. *Id.* That Congress intended that technology in the automobile industry "catch up with" the auto-



plan development.<sup>56</sup> Moreover, the Act should not be interpreted in a way that would jeopardize attainment of primary standards by the statutory deadline. That, however, may be the result if the interpretation of the Fifth Circuit is accepted by this Court.

As discussed above, when the States adopted their plans, they lacked the time and resources to develop sophisticated control strategies. As a result, many States adopted uniform control strategies to assure that any source contributing to violations of primary standards would reduce its emissions to attain those standards. These State plans, as applied to many

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mobile "emission standards" under section 202 is irrelevant to the authority of the States to relax requirements relating to *ambient* standards under section 110 of the Act.

Moreover, as this Court stated in *United States v. Allegheny-Ludlum Steel Corp.*, 406 U.S. 742, 755 (1972): "It is well established that an agency's authority to proceed in a complex area . . . by means of rules of general application entails a concomitant authority to provide exemption procedures to allow for special circumstances." An interpretation of the Act that allows plan revisions whenever the requirements of section 110(a)(2) are met is consistent with this principle. The Fifth Circuit's interpretation is not. Even the limited relief provided by section 110(f) may not be available where, for example, a plan requirement was immediately effective. Under section 110(f), the Governor of a State must request a postponement "[p]rior to the date on which any stationary source . . . is required to comply with any requirement of an applicable implementation plan." (Emphasis added.)

<sup>56</sup> Cf. *Duquesne Light Co. v. EPA*, 481 F.2d 1, 9 (3rd Cir. 1973). Following the remand in *Buckeye Power, Inc. v. EPA*, 481 F.2d 162 (6th Cir. 1973), the Ohio Environmental Protection Agency held extensive hearings on the limitations in the Ohio plan. The Hearing Examiners found that many of those limitations were both unnecessary and unreasonable and recommended significant changes in the Ohio plan. Hearing Examiners' Report and Recommendations, *In re Consolidated Electric Utility Cases*, No. 73-A-P-120 (Ohio EPA, Sept. 6, 1974).

sources within the State, were more stringent than the Act required. However, the Act and EPA's regulations provided for future changes in plans, and the States included procedures under which unnecessary or unreasonable requirements could be relaxed.<sup>57</sup>

When EPA approved State plans in May 1972, it was recognized that it might not be possible for all sources to meet the sulfur oxide requirements and deadlines that were included in most State plans.<sup>58</sup> With the advent of the energy crisis, many owners of sources that had planned to comply with State plans through conversions to low sulfur fuels found that they could not use such fuels.<sup>59</sup> Thus, compliance with deadlines that might have been reasonable when plans were adopted became impossible since those deadlines were predicated on abundant low sulfur fuel resources.

EPA soon realized that, if the sulfur oxide requirements in State plans were not changed, primary standards might not be attained by the statutory deadline. Scarce fuels and pollution control equipment were needed by sources in areas where those standards were being exceeded. Thus, EPA began actively encouraging

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<sup>57</sup> Text pp. 8-10 *supra*.

<sup>58</sup> 37 Fed. Reg. 10843-44 (1972). It should be noted that EPA did not consider the technical or economic feasibility of compliance with plan requirements when it approved State plans in May 1972. See, e.g., *Buckeye Power*, 481 F.2d at 168-69.

<sup>59</sup> On August 29, 1973, the Energy Policy Office published proposed regulations to prohibit sources from converting to low sulfur fuels except where necessary to attain primary standards. 38 Fed. Reg. 23339 (1973). These regulations were promulgated on November 27, 1973. 38 Fed. Reg. 32577 (1973). When the Federal Energy Office was created, these regulations were re-promulgated. 39 Fed. Reg. 15137 (1974).

the States to revise their plans to defer compliance with emission controls that were more stringent than required under section 110(a)(2) of the Act. The following statement appearing in the August 23, 1973, *Federal Register* is representative of EPA's "clean fuels policy."

[I]t is apparent that there is not enough low sulfur coal and stack gas cleaning equipment available to meet the regulations in all areas of all States in 1975. In recognition of this, the Administrator, on December 18, 1972, in a letter to the governors of the States in the areas where this fuels deficit exists, recommended that the States consider deferral of the effective dates of regulations affecting coal-burning sources of sulfur oxides where such deferral can be made without affecting attainment of the primary standards by the date required by the Act. Analysis shows that if this is done, adequate fuels and control equipment will be available for meeting all regulations necessary for attainment of the national primary ambient air quality standards by mid-1975. . . .

States are encouraged again to consider the alternatives available to them within the framework of the Clean Air Act. Modification of unnecessarily restrictive emission regulations, relaxation of final compliance dates for sources which need not be controlled to meet the primary standards, and requests for postponements under section 110(f) are all mechanisms to alleviate the short-term fuels problem.<sup>60</sup>

At the time that State "variance" procedures achieved critical importance both from the standpoint of meeting the objectives of the Clean Air Act and

<sup>60</sup> 38 Fed. Reg. 22736 (1973).

from the standpoint of our national energy policy, the Fifth Circuit held that the States were precluded from using those procedures to adopt proposed revisions to their plans. Developments since that decision underline the need for flexibility in the administration of air quality controls and rejection of the Fifth Circuit holding.

First, it is now clear that fuel resources must be allocated to reduce the Nation's dependence on imported oil. Where American coal can be burned instead of foreign oil, without jeopardy to the public health, air quality regulations should be capable of ready adjustment to promote the use of domestic energy resources.

Second, it is now recognized that the availability of pollution-control equipment is limited. What is available should be channeled by regulation to those specific sources or areas where it is most needed, free of artificial requirements for uniform regulation.

Third, the capital-intensive utility industry is currently faced with a financial crisis: The inability to raise needed capital in a depressed market. To the extent that capital funds can be raised at all, they should be spent on pollution control that is acutely needed or on construction of generating facilities required to meet future energy demands.

Confirmation by this Court of the authority of the individual States to change plan requirements on a case-by-case basis will help insure that scarce economic and energy resources are used in a manner consistent with the public interest.

**CONCLUSION**

For the foregoing reasons, the Court should reverse the decision of the Fifth Circuit.

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# ***In the Supreme Court of the United States***

OCTOBER TERM, 1974

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No. 73-1742

RUSSELL E. TRAIN, ADMINISTRATOR, UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY, AND UNITED  
STATES ENVIRONMENTAL PROTECTION AGENCY, PETI-  
TIONERS

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL.

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*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE FIFTH CIRCUIT*

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**BRIEF FOR THE UNITED STATES**

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## **OPINION BELOW**

The opinion of the court of appeals (Pet. App. A, 1a-52a) is reported at 489 F. 2d 390.

## **JURISDICTION**

The judgment of the court of appeals was entered on February 8, 1974 (Pet. App. B, 53a-54a). The petition for a writ of certiorari was filed on May 20, 1974, and was granted on October 15, 1974. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

**QUESTION PRESENTED**

Whether, under the Clean Air Act, as amended, the Environmental Protection Agency must disapprove provisions of a state implementation plan that authorize the state to grant variances from the state plan during the period prior to the Act's deadlines for attainment of national ambient air quality standards, where such variances comply with the provisions of the Act concerning "revisions" of plans rather than those concerning "postponements" of plan requirements.

**STATUTE INVOLVED**

The Clean Air Amendments of 1970, 84 Stat. 1676, 42 U.S.C. 1857, *et seq.*, are set forth in relevant part in Appendix C to the petition (Pet. App. 55a-64a).

**STATEMENT**

On April 30, 1971, as required by the Clean Air Amendments of 1970, 84 Stat. 1679, 42 U.S.C. 1857 e-4(a)(1), the Environmental Protection Agency ("EPA") promulgated nationally-applicable ambient air<sup>1</sup> quality standards for specified pollutants. Such standards are of two general types: "primary" standards, *i.e.*, those that in EPA's judgment are "requisite to protect the public health" (42 U.S.C. 1857e-4(b)(1)), and "secondary" standards, *i.e.*, those that in EPA's judgment are "requisite to protect the public welfare from any known or anticipated adverse ef-

<sup>1</sup> Although not defined in the Act, "ambient air" means the portion of the atmosphere, external to buildings, to which the general public has access. See 40 C.F.R. 50.1(e).

fects associated with the presence of such air pollutant in the ambient air." 42 U.S.C. 1857c-4(b)(2).

On January 27, 1972, within the time prescribed by the Amendments (42 U.S.C. 1857c-5(a)(1)), the State of Georgia submitted to EPA its implementation plan. 40 C.F.R. 52.570(b). In accordance with EPA's guidelines for implementation plans (40 C.F.R. Part 51), the plan showed how Georgia will attain national primary and secondary ambient air quality standards within the statutory deadlines (the former as expeditiously as practicable, but in no case later than three years from the date of approval of the plan, and the latter within a reasonable time), and will maintain them thereafter, as required by 42 U.S.C. 1857c-5(a)(1) and (2)(A)(i)-(ii). On May 31, 1972, EPA approved Georgia's plan (with exceptions not here material). 37 Fed. Reg. 10859; 40 C.F.R. 52.572-52.574.

Within the time provided by the Amendments (42 U.S.C. 1857h-5(b)(1)), respondent Natural Resources Defense Council ("NRDC") and others petitioned the court of appeals for review of EPA's approval of the Georgia plan, claiming, *inter alia*, that the approval was invalid because a Georgia statute included in the plan (Ga. Code Ann. 88-912)<sup>2</sup> em-

<sup>2</sup> Section 88-912 reads in full:

"The department may grant specific or general classes of variances from the particular requirements of any rule, regulation or general order to such specific persons or class of persons or such specific source or general classes of sources of air contaminants upon such conditions as it may deem necessary to protect the public health and welfare, if it finds that strict compliance with such rule, regulation or general order is inappro-

powered the State Department of Public Health to grant variances from the plan in a manner contrary to the requirements of Section 110(f) of the Act, 42 U.S.C. 1857e-5(f).

That section permits EPA, in accordance with specified procedures, to approve postponements of the applicability of requirements of a plan to a particular stationary source or class of moving sources for up to

appropriate because of conditions beyond the control of the person or classes of persons granted such variances, or because of special circumstances which would render strict compliance unreasonable, unduly burdensome, or impractical due to special physical conditions or causes, or because strict compliance would result in substantial curtailment or closing down of one or more businesses, plants or operations, or because no alternative facility or method of handling is yet available. Such variances may be limited in time. In determining whether or not such variances shall be granted, the department shall give consideration to the protection of the public health, safety and general welfare of the public, and weigh the equities involved and the relative advantages and disadvantages to the resident and the occupation or activity affected. Any person or persons seeking a variance shall do so by filing a petition therefor with the director of the department. The director shall promptly investigate such petition and make a recommendation as to the disposition thereof. If such recommendation is against the granting of the variance, a hearing shall be held thereon within 15 days after notice to the petitioner. If the recommendation of the director is for the granting of a variance, the department may do so without a hearing: Provided, however, that upon the petition of any person aggrieved by the granting of a variance, a public hearing shall be held thereon. A variance granted may be revoked or modified by the department after a public hearing which shall be held after giving at least 15 days prior notice. Such notice shall be served upon all persons, known to the department, who will be subjected to greater restrictions if such variance is revoked or modified, or are likely to be affected or who have filed with the department a written request for such notification."

one year upon application of the governor. The court of appeals agreed with respondents and rejected EPA's contention that, during the period prior to the deadline for attainment of national primary standards (July 1975 for Georgia<sup>3</sup>), variances are not necessarily subject to Section 110(f) and rather may properly be treated as "revisions" of the plan, subject to EPA's approval under the less formal procedures of Section 110(a)(3), 42 U.S.C. 1857c-5(a)(3), where such variances would not interfere with timely attainment of the standards.

#### INTRODUCTION AND SUMMARY OF ARGUMENT

The ultimate issue in this case is whether a request for a variance<sup>4</sup> from a state's plan to implement air quality standards under the Clean Air Amendments of 1970 during the period prior to the state's deadline for the attainment of such standards is subject exclusively to the provisions of the Act concerning "postponements," as the court of appeals held, or whether EPA has properly construed the Act as permitting it to treat such variances as "revisions" of plans.

Under the revision procedures, the state is required to hold a public hearing, EPA may grant approval if the variance would not prevent timely attainment of

<sup>3</sup>The three-year period began to run in July 1972, when EPA approved, after revisions, the portions of Georgia plan that it had initially disapproved.

<sup>4</sup>We use the term "variance" generically to cover any postponement, amelioration, conditional permit, or other modification of an emission standard, compliance schedule, or other element of a state's implementation plan.

national standards, and its action is subject to judicial review. Under the postponement procedures, EPA itself must hold formal public hearings, it may approve a postponement (for up to one year) even if it would interfere with timely attainment of standards, but only if other specified conditions are satisfied, and its action is subject to judicial review.

While the question presented in this case involves construction of statutory language, that language should be construed in light of the background of the Clear Air Amendments and with an awareness of the complex structure of the Clean Air Act created by them—an Act designed to implement important national policy goals within a context of cooperative federalism.

1. The role of the federal government in efforts to control air pollution has grown steadily over the past two decades through a series of measured steps that reflect certain inherent dimensions of the problem. These include: its interstate nature, polluted air being mobile and not confinable within the boundaries of a state; the advantage, in terms of availability of resources and avoidance of duplication, of having certain actions taken on the national level; the practical desirability of leaving both the adaptation of general standards to particular circumstances and the enforcement of measures adopted to achieve such goals to state and local governments, whose personnel are ordinarily closer to the physical sources of pollution and those affected by it and by the measures needed to reduce it; and the desirability, in our federal sys-



tem, of avoiding where possible an extensive federal law enforcement apparatus.

Thus, in 1955, Congress authorized the Surgeon General, under the supervision of the Secretary of Health, Education, and Welfare ("the Secretary"), to study the problem of air pollution, to provide technical assistance (*e.g.*, investigations, research, surveys) to state and local governments trying to abate pollution, and to make grants-in-aid for research, training and demonstration projects. 69 Stat. 322-323. In 1960, Congress directed the Surgeon General to conduct a study concerning the health hazards resulting from motor vehicle emissions. 74 Stat. 162.

In the Clean Air Act of 1963, 77 Stat. 392-401, Congress authorized the Secretary to expand research concerning air pollution and to work with the states to develop uniform laws to prevent and control such pollution. Although federal authorities were empowered to intervene directly to abate interstate pollution in limited circumstances (77 Stat. 396-399), the Act explicitly left the primary responsibility in this field with state and local governments. Congress amended the 1963 Act in adopting the Motor Vehicle Air Pollution Control Act of 1965, 79 Stat. 992-996, which authorized the Secretary to establish federal standards to control motor vehicle emissions, and again in 1966 to increase the Secretary's authority to make grants to state air pollution control agencies. 80 Stat. 954-955.

Convinced "that air pollution is a threat to the health and well being of the American people" (H.

Rep. No. 728, 90th Cong., 1st Sess., p. 3), Congress enacted a still more comprehensive statute, the Air Quality Act of 1967. 81 Stat. 485-507. This law reiterated the congressional premise of the Clean Air Act "that the prevention and control of air pollution at its source is the primary responsibility of States and local governments \* \* \*." 81 Stat. 485, 42 U.S.C. 1857(a)(3). Accordingly, while the Secretary was required to designate air quality control regions and to issue criteria of air quality required to protect the public health and welfare, the states were given the responsibility to adopt ambient air quality standards for those regions, as well as to adopt implementation plans to maintain and enforce their standards. State standards and plans both had to be approved by the Secretary, who, if a state failed to comply, could promulgate federal standards and plans for that state. Where action reasonably calculated to secure abatement of violations of the air quality standards was not taken, the Secretary could, if the health or welfare of persons in another state (or, in some circumstances, another country) was endangered, request the Attorney General to bring suit to abate the pollution source. 81 Stat. 490-497.

2. Dissatisfied with the rate of progress under the 1967 Act,<sup>3</sup> and responding to heightened concern about

<sup>3</sup> By 1970, only ten state standards had been approved, and, while state implementation plans had been submitted to the Secretary, none had yet been approved. As a result, there had been no federal enforcement under the 1967 Act and only one enforcement action litigated since 1963. 116 Cong. Rec. 32914-32916; see *United States v. Bishop Processing Co.*, 423 F. 2d 169 (C. A. 1), certiorari denied, 398 U.S. 904.

air pollution and other environmental problems, Congress substantially revised the Clean Air Act in enacting the Clean Air Amendments of 1970. 84 Stat. 1676. A fundamental feature of the Amendments was the adoption of fixed deadlines for the accomplishment of specified statutory objectives concerning air quality throughout the country, although the states were accorded substantial latitude in devising strategies for meeting the statutory goals in accordance with a timetable established by the Amendments, subject to guidelines adopted and implemented by EPA.<sup>6</sup>

More specifically, the pertinent features of the Amendments are as follows. First, based upon air quality criteria already adopted pursuant to the 1967 Act or subsequently adopted, EPA was ordered, within 30 days of the enactment of the Amendments on December 31, 1970, to publish proposed regulations prescribing national "primary" and "secondary" ambient air quality standards (see p. 2, *supra*); after 90 days for comments, EPA was then obliged to promulgate such standards. 42 U.S.C. 1857c-4(a) (1). Second, after EPA's promulgation of standards, each state was required, after public hearings, to adopt and submit to EPA a plan for the implementation, maintenance and enforcement of these national

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<sup>6</sup> While a House-Senate conference committee was resolving differences between bills passed by the respective houses, the President created EPA and vested in it the powers and responsibilities of the Secretary under the Clean Air Act and other legislation. Reorganization Plan No. 3 of 1970, (35 Fed. Reg. 15623), 84 Stat. 2086. Accordingly, the amendments vested enforcement authority in the Administrator of EPA. See H. Conf. Rep. No. 91-4783, 91st Cong., 2d Sess., p. 42.

standards. 42 U.S.C. 1857c-5(a)(1). Third, EPA was required, within four months of submission, either to approve or disapprove each state implementation plan. 42 U.S.C. 1857c-5(a)(2).<sup>7</sup>

The Amendments list eight conditions that EPA must find satisfied before it may approve a plan. One requirement is that the state's implementation plan provide for attaining the primary national ambient air quality standard "as expeditiously as practicable but \* \* \* in no case later than three years from the date of approval of such plan," unless EPA, upon application of the Governor made when the plan was submitted, extends this time for not more than two years (42 U.S.C. 1857c-5(a)(2)(A)(i) and (e)); secondary standards must be attained within a "reasonable" time. 42 U.S.C. 1857c-5(a)(2)(A)(ii). A further requirement is that the plan include "emission limitations, schedules, and timetables for compliance with such limitations, and such other measures as may be necessary to insure attainment and maintenance of such primary or secondary standard \* \* \*." 42 U.S.C. 1857c-5(a)(2)(B).

In addition, Section 110(a)(3) authorizes EPA to approve "revisions" in state implementation plans so long as they conform to the requirements of the Act for the plans themselves. 42 U.S.C. 1857c-5(a)(3). Beyond the authority to approve revisions, Section 110(f) empowered EPA under specified circumstances

<sup>7</sup> If a state declines to submit a plan or to revise its plan to the extent that it has been disapproved, EPA is authorized to prepare and promulgate such a plan or portion thereof. 42 U.S.C. 1857c-5(c).

to "postpone" any requirement of an implementation plan "[p]rior to the date on which any stationary source or class of moving sources is required to comply \* \* \*." 42 U.S.C. 1857e-5(f)(1). Revisions and postponements both require EPA's approval, which is subject to judicial review (42 U.S.C. 1857e-5(f)(2)(B), 1857h-5(b)(1)), and both must be preceded by the opportunity for a public hearing, to be conducted by the state in the case of a revision and by EPA in the case of a postponement. The Act specifically requires that the latter type of determination be made on the record, based on a fair evaluation of the entire record at the hearing, and that it include detailed findings and conclusions. 42 U.S.C. 1857e-5(f)(2)(A).

3. In substantially revising the approach to be taken by the federal government and the states in combating together the problem of air pollution, the Clean Air Amendments of 1970 thus imposed on newly-created EPA and the states, under a complex statutory scheme, a variety of substantial obligations to be met within specified deadlines. One of the many issues EPA was required to resolve at the outset concerned the procedures to be followed if a state chose to make some or all of the general requirements of its implementation plan more stringent than the standards required, or to make them effective prior to the statutory deadline for attainment of national ambient air quality standards, but also desired to authorize variances that would not interfere with the state's timely attainment of those standards. EPA concluded that such revisions could be treated as "revisions" of plans

under Section 110(a)(3) of the Act, while variances that would affect attainment or maintenance of national standards by or after the deadline would be treated as "postponements" under Section 110(f).

Accordingly, when EPA promulgated guidelines for the preparation of state implementation plans in 1971, it took the position, with the concurrence of NRDC (see p. 31, *infra*), that Section 110(f) of the Act did not apply exclusively to all exceptions or variances, but only to those that would affect the ability of a state to attain within the statutory timetable, and thereafter maintain, the national standards; variances that would not have such an effect were to be treated as revisions under Section 110(a)(3). 36 Fed. Reg. 22400, 22405; 40 C.F.R. 51.6, 51.32(f).

Relying on EPA's authoritative interpretation of the Act concerning variances, Georgia and other states adopted implementation plans effective immediately or well before the deadlines for attainment of national standards, with the intention of granting variances or exceptions to specific sources that could not feasibly be brought into immediate compliance. These states proposed to defer applicability only where necessary, by placing, excepted sources on expeditious but reasonable compliance schedules which would provide for attainment of the national standards by the mandatory compliance date, which for Georgia is July 1975 for both primary and secondary standards. Other states, such as Florida, made their requirements effective at the latest possible date allowed by the Clean Air Act—generally mid-1975.

Such states would therefore normally have no need to grant variances prior to the mandatory compliance dates.

4. In review proceedings initiated by respondent NRDC, the Courts of Appeals for the First<sup>8</sup> and Eighth<sup>9</sup> Circuits (later joined by the Second<sup>10</sup> and Ninth)<sup>11</sup> held that EPA had properly construed Section 110 as authorizing it to treat some variances other than as postponements under Section 110(f), at least insofar as the variance pertained to the period prior to the deadline for attainment of the national standards. Most of these courts also held, however, that a variance pertaining to the post-attainment period was, with limited exceptions, subject to the procedures pertaining to postponements, even if the particular variance did not threaten the state's ability to attain and maintain national standards.

Accepting the distinction drawn by the courts between pre-deadline and post-deadline variances as a reasonable interpretation of the Act, albeit less desirable than its own interpretation, EPA amended its guidelines to reflect this distinction and to conform with the rulings in these cases concerning the pre-

<sup>8</sup> *Natural Resources Defense Council, Inc. v. Environmental Protection Agency*, 478 F. 2d 875 (C.A. 1).

<sup>9</sup> *Natural Resources Defense Council, Inc. v. Environmental Protection Agency*, 483 F. 2d 690 (C.A. 8).

<sup>10</sup> *Natural Resources Defense Council, Inc. v. Environmental Protection Agency*, 494 F. 2d 549 (C.A. 2).

<sup>11</sup> *Natural Resources Defense Council, Inc. v. Environmental Protection Agency*, No. 72-2115 (C.A. 9), decided November 11, 1971.

attainment period. 39 Fed. Reg. 34533-34535; 40 C.F.R. 51.11(g), 51.15(d), 51.32(f).<sup>12</sup>

5. In the present case the court of appeals disagreed with the other circuits and concluded (Pet. App. 25a-27a):

We are unable to agree that the statute envisions granting the states the kind of "flexibility" during the "pre-attainment period" which provisions like Georgia's section 88-912 would afford. The parts of the statute on which the First Circuit relied were the provision of section 1857e-5(a)(2)(A)(i) that primary standards had to be met, not immediately, but only "as expeditiously as practicable", but in no case later than three years from the adoption of the state plan, and the provision of section 1857e-5(e) for a possible two-year extension of the deadline in sharply restricted circumstances. The First Circuit said that "[t]he provision for a three-year grace period, followed by the possibility of a further two-year extension, indicates that Congress did not expect immediate achievement of standards." 478 F. 2d at 887 (emphasis supplied).

This statement, however, contains a crucial ambiguity, and it supports the First Circuit's holding only if that ambiguity is overlooked. It is of course true that the provision of a three-year grace period, and of the possibility, however limited, of an extension, do mean that Congress did not expect immediate achievement of

<sup>12</sup> At the same time, EPA disapproved *pro tanto* all provisions of plans, including the Georgia plan, that permitted variances to defer compliance beyond the deadlines for attainment of national standards. 39 Fed. Reg. 34535; 40 C.F.R. 52.26.



*ambient* standards. But it does *not* follow that Congress did not contemplate that *emission* standards would not have to be met "immediately" as their scheduled dates—set by the implementation plan—arrived. We think that the provisions of section 1857c-5(a)(2)(A)(i) and section 1857c-5(e) do not provide *any* support for the latter conclusion. Nor do we find any support for that conclusion anywhere in the statute. Instead we find that the statute as a whole supports the general view of its overall strategy we articulated above: that the plan of the statute was to secure ambitious commitments at the planning stage, and then, by making it difficult to depart from those commitments, to assure that departures would be made only in cases of real need. That view precludes the conclusion that Congress intended the states to have the kind of "flexibility" state variance plans would give them.

Thus we hold that it was inconsistent with the statute for Georgia to adopt its own variance procedures, and that the Administrator exceeded his authority in approving section 88-912. Accordingly, we direct the Administrator to publish forthwith his disapproval of section 88-912.

6. It is our submission that the court of appeals' decision rests upon a misreading of the statutory language and its history, and a misapprehension of the structure and purposes of the Clean Air Act. In providing EPA in Section 110(f) with authority to postpone deadlines in accordance with burdensome and relatively stringent statutory requirements, Congress

was plainly concerned with providing a limited means for dealing with sources unable to comply with the requirements of state plans by the deadlines for attainment of national standards. That, of course, does not mean that Section 110(f) should be construed as providing the only means for relief from any requirement of a state plan at any time, even if the general requirement had been made more stringent, or effective sooner, than was needed to attain such standards. To the contrary, such a reading, if adopted by EPA at the outset, would very likely have resulted overall in less ambitious requirements and commitments than many states adopted or required.

The principal conclusion of the court of appeals that, as contended by NRDC, Section 110(f) provides the exclusive means for obtaining variances from requirements of a state plan prior to the deadline for attainment, has now been rejected by the other four courts of appeals that have considered the question. Those courts have recognized the need and authority under the Act for a measure of flexibility not afforded by the postponement procedures of Section 110(f), particularly in the pre-attainment period. Indeed, all of the other courts of appeals have, albeit to differing degrees, acknowledged some variance authority apart from Section 110(f) in the post-attainment period.

7. If sustained, the decision below would have severe adverse consequences for EPA in its efforts to administer and enforce effectively its manifold statutory responsibilities. One possibility is that EPA would itself be required to hold formal public hear-

ings concerning many of the thousands of variances already granted by states—after public hearings held by the state—and approved by EPA. In addition, invalidation of EPA's 1971 interpretation of the Act at this time would be seriously unfair to the states and other persons subject to the Act who have relied in good faith on that interpretation—once endorsed by NRDC itself (see p. 31, *infra*) in formulating and responding to control strategies.

#### ARGUMENT

VARIANCES FROM STATE IMPLEMENTATION PLANS THAT DO NOT AFFECT ATTAINMENT OF NATIONAL STANDARDS WITHIN THE STATUTORY DEADLINES OR THEIR MAINTENANCE THEREAFTER NEED NOT BE TREATED BY EPA AS "POSTPONEMENTS" OF THE REQUIREMENTS OF STATE PLANS.

The decision of the court of appeals in this case set aside a reasonable construction of the Clean Air Amendments made by the agency responsible for implementing the Amendments and sustained by all other courts of appeals that have considered the question, *viz.*, that the provisions of Section 110 (f) of the Act concerning postponements are not the sole means by which a state may grant a variance from the requirements of its implementation plan. That decision is not compelled or supported by the language of the Amendments or their legislative history, or by the overall structure and purpose of the Clean Air Act. Moreover, the court of appeals' construction of the Amendments would have unwarranted adverse con-

sequences for EPA, the states, and the persons subject to the Act.

A. EPA'S TREATMENT OF VARIANCES NOT AFFECTING ATTAINMENT OF AIR QUALITY STANDARDS WITHIN THE PRESCRIBED DEADLINE AS NOT BEING GOVERNED EXCLUSIVELY BY SECTION 110(F) IS CONSISTENT WITH THE LANGUAGE, STRUCTURE AND LEGISLATIVE HISTORY OF THE CLEAN AIR AMENDMENTS

Under the statutory scheme created by the Clean Air Amendments, within nine months after EPA's promulgation of primary and secondary national ambient air quality standards (*i.e.*, by January 31, 1972), each state, after holding public hearings, was required to submit to EPA a plan providing for the implementation, maintenance, and enforcement of such standards in the state. EPA was required by Section 110(a)(2) to approve each state plan within four months of the deadline for submission if it had been adopted after public hearings and if it satisfied eight general conditions. The first condition was that the plan provide for the attainment of the national primary ambient air quality standards it was implementing "as expeditiously as practicable but \* \* \* in no case later than three years from the date of approval of such plan," and for the attainment of secondary standards within "a reasonable time." 42 U.S.C. 1857e-5(a)(2)(A)(i) and (ii). Other conditions require that the plan include specified categories of control measures (*e.g.*, emissions limitations, compliance schedules) and procedures (*e.g.*, provisions for intergovernmental cooperation; reports on emissions; revisions to take ac-

count of changes in the national standards). 42 U.S.C. 1857e-5(a)(2)(B)-(H).<sup>13</sup>

<sup>13</sup> Section 110(a)(2) provides that EPA shall not approve a plan unless:

"(A)(i) in the case of a plan implementing a national primary ambient air quality standard, it provides for the attainment of such primary standard as expeditiously as practicable but (subject to subsection (c) of this section) in no case later than three years from the date of approval of such plan (or any revision thereof to take account of a revised primary standard); and (ii) in the case of a plan implementing a national secondary ambient air quality standard, it specifies a reasonable time at which such secondary standard will be attained;

"(B) it includes emission limitations, schedules, and timetables for compliance with such limitations, and such other measures as may be necessary to insure attainment and maintenance of such primary or secondary standard, including, but not limited to, land-use and transportation controls;

"(C) it includes provision for establishment and operation of appropriate devices, methods, systems, and procedures necessary to (i) monitor, compile, and analyze data on ambient air quality and, (ii) upon request, make such data available to the Administrator;

"(D) it includes a procedure, meeting the requirements of paragraph (4), for review (prior to construction or modification) of the location of new sources to which a standard of performance will apply;

"(E) it contains adequate provisions for intergovernmental cooperation, including measures necessary to insure that emissions of air pollutants from sources located in any air quality control region will not interfere with the attainment or maintenance of such primary or secondary standard in any portion of such region outside of such State or in any other air quality control region;

"(F) it provides (i) necessary assurances that the State will have adequate personnel, funding, and authority to carry out such implementation plan, (ii) requirements for installation of equipment by owners or operators of stationary sources to monitor emissions from such sources, (iii) for periodic reports on the nature and amounts of such emissions; (iv) that such re-

The Amendments provided three means to alter deadlines imposed by Section 110 or a plan promulgated thereunder. If it appeared at the outset that certain sources would not be able to comply with the requirements of a plan to meet a primary standard within the three-year period, the Governor of a state could request when submitting an implementation plan, and EPA was authorized to grant, an extension of the statutory deadline for up to two years for such sources, in accordance with the requirements of Section 110(e).<sup>14</sup> Georgia sought no such extension, and that provision is not in issue in this case.

ports shall be correlated by the State agency with any emission limitations or standards established pursuant to this chapter, which reports shall be available at reasonable times for public inspection; and (v) for authority comparable to that in section 303 [42 U.S.C. 1857h-1], and adequate contingency plans to implement such authority;

"(G) it provides, to the extent necessary and practicable, for periodic inspection and testing of motor vehicles to enforce compliance with applicable emission standards; and

"(H) it provides for revision, after public hearings, of such plan (i) from time to time as may be necessary to take account of revisions of such national primary or secondary ambient air quality standard or the availability of improved or more expeditious methods of achieving such primary or secondary standard; or (ii) whenever the Administrator finds on the basis of information available to him that the plan is substantially inadequate to achieve the national ambient air quality primary or secondary standard which it implements."

<sup>14</sup> Section 110(e) authorizes EPA to approve an extension if it determines that (42 U.S.C. 1857e-5(e)):

\* \* \* \* \*

(A) one or more emission sources (or classes of moving sources) are unable to comply with the requirements of such plan which implement such primary standard because the necessary technology or other alternatives are not

Second, the state is authorized to make "revisions" in compliance schedules or any other aspect of an approved implementation plan, and, under Section 110(a)(3), EPA is authorized to approve such revisions if they have been adopted by the state after public hearings and they meet the requirements of Section 110(a)(2) for implementation plans themselves, including, of course, the requirement of attaining national standards within the pertinent deadlines. 42 U.S.C. 1857c-5(a)(3). EPA's approval of an implementation plan is explicitly made subject to judicial review in a court of appeals by a provision (42 U.S.C. 1857h-5(b)(1)) which EPA regards as equally applicable to its approval of revisions of plans.

Third, prior to the date on which any stationary source or class of moving source is required to comply with a requirement of an implementation plan, the Governor may apply for, and EPA may grant, a "postponement" of such deadline under Section 110

available or will not be available soon enough to permit compliance within such three-year period, and

(B) The State has considered and applied as a part of its plan reasonably available alternative means of attaining such primary standard and has justifiably concluded that attainment of such primary standard within the three years cannot be achieved [and]

(2) \* \* \* the State plan provides for—

(A) application of the requirements of the plan which implement such primary standard to all emission sources in such region other than the sources (or classes) described in paragraph (1)(A) within the three-year period, and

(B) such interim measures of control of the sources (or classes) described in paragraph (1)(A) as the Administrator determines to be reasonable under the circumstances.

(f), 42 U.S.C. 1857e-5(f). While the Act does not require that the state afford an opportunity for a public hearing before requesting a postponement, as it must with a revision of a plan, Section 110(f) does require that EPA itself hold a formal public hearing, and that its decision be based on the record of that hearing and be accompanied by detailed findings and conclusions. 42 U.S.C. 1857e-5(f)(2)(A). Moreover, although the decision to grant a postponement, unlike a revision, is not subject to the three-year deadline and other requirements of Section 110(a)(2) pertaining to implementation plans, postponements are subject to several conditions<sup>15</sup> similar to those pertaining to requests for extension of the three-year deadline under Section 110(e) (see pp. 20-21, *supra*, n. 14), and a postponement may be granted "for not more than one year." 42 U.S.C. 1857e-5(f)(1). The decision to grant a postponement is also subject to judicial review in a court of appeals. 42 U.S.C. 1857e-5(f)(2)(B).

<sup>15</sup> Under 42 U.S.C. 1857e-5(f)(1), EPA is required to approve a postponement if it determines that:

(A) good faith efforts have been made to comply with such requirement before such date, (B) such source (or class) is unable to comply with such requirement because the necessary technology or other alternative methods of control are not available or have not been available for a sufficient period of time, (C) any available alternative operating procedures and interim control measures have reduced or will reduce the impact of such source on public health, and (D) the continued operation of such source is essential to national security or to the public health or welfare \* \* \*.



The legislative history of the Clean Air Amendments provides limited but useful guidance in applying the pertinent provisions of this complex legislation to the present issue. Briefly, the Senate had passed a bill far more rigorous than the bill earlier passed by the House, and the conference committee produced in the waning days of the 91st Congress a compromise bill that differed in many substantial respects from either the Senate or House bill, while giving only a relatively truncated explanation of the new bill.

The House-passed bill (H.R. 17255, 91st Cong., 2d Sess.; H. Rep. No. 91-1146, 91st Cong., 2d Sess.) adhered rather closely to the then-existing provisions of the Clean Air Act as amended by the Air Quality Act of 1967 (see p. 8, *supra*). Most significantly, the bill did not establish a fixed deadline for attaining national ambient air quality standards promulgated by the Secretary,<sup>16</sup> and so had no pertinent provisions for extensions, revisions or postponements of deadlines.<sup>17</sup>

Section 110 of the Senate bill (S. 4358, 91st Cong., 2d Sess.; S. Rep. No. 91-1196, 91st Cong., 2d Sess.), passed by the Senate as an amendment to the House bill, provided for the promulgation within 30 days of national ambient air quality "standards" concerning

<sup>16</sup> EPA had not yet been created (see p. 9, *supra*, n. 6).

<sup>17</sup> Under the House bill, the Secretary was required to issue proposed national ambient air quality standards within 30 days and to promulgate such standards within a "reasonable time" after receiving comments on the proposals. States were required to submit implementation plans within 240 days of promulgation of the standards, but the plan need only have assured achievement of the standards "within a reasonable time."

health of persons and "goals" concerning public health and welfare (corresponding generally to primary and secondary standards under the final amendments). Under Section 111 of the Senate bill, each state was required within nine months thereafter to submit an implementation plan, which the Secretary was required to approve within four months if the plan satisfied ten specified conditions, including a requirement that it provide for the attainment of national standards within three years (there being no requirement to attempt to attain such standards sooner if practicable).

The bill did not provide for extension of the three-year deadline for attaining national "standards," although it did authorize the Secretary, where he determined it to be necessary, to extend the deadline for submission of a plan to implement national "goals" for up to eighteen months. The bill contained no counterpart to Section 110(a)(3) authorizing EPA to approve revisions in approved plans.<sup>18</sup>

Section 111(f) of the Senate bill, however, did provide that no later than one year before the deadline for attainment of a national standard the Governor of a state could petition a three-judge district court for relief from the expiration of the deadline as to a region or persons, and the court would be authorized to grant such relief, for up to one year, only if specified conditions were satisfied, which conditions were similar to those now contained in Section 110(f) (see

<sup>18</sup> Section 111(a)(2)(I) of the bill contained limited authority for revisions to take account of changes in the standards or goals promulgated by the Secretary or of changes in the availability of methods for attaining them.

p. 22, *infra*, n. 15).<sup>19</sup> See also S. Rep. No. 91-1196, *supra*, at pp. 14-15.

The conference report (H. Conf. Rep. No. 91-1783, 91st Cong., 2d Sess.), after summarizing the respective provisions of the House bill and the Senate amendment thereto, stated (*id.* at 45):

The conference substitute follows the Senate amendment in establishing deadlines for implementing primary ambient air quality standards but leaves the States free to establish a reasonable time period within which secondary ambient air quality standards will be implemented. The conference substitute modifies the Senate amendment in that it allows the Administrator to grant extensions for good causes shown upon application by the Governors.

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<sup>19</sup> The court was authorized to grant a postponement only after (1) determining that such a relief is essential to the public interest and the general welfare of the persons in the region affected, and (2) finding

(A) that substantial efforts have been made to protect the health of persons in such region; and

(B) that means to control emissions causing or contributing to such failure are not available or have not been available for a sufficient period to achieve compliance prior to the expiration of the period to attain an applicable standard; or

(C) that the failure to achieve such ambient air quality standard is caused by emissions from a Federal facility for which the President has granted an exemption pursuant to section 118 of this Act.

Section 118 of the bill, like Section 118 of the Act, 42 U.S.C. 1857f, authorized the President to exempt Federal properties from compliance with certain requirements of the Act if he determined it "to be in the paramount interest of the United States to do so."

To this brief explanation, Senator Muskie, the primary author of the Senate bill, added the following comments in a Summary of the Provisions of Conference Agreement on the Clean Air Amendments of 1970 (116 Cong. Rec. 42384-42385; emphasis supplied):

If, at the time of plan approval, it appears impossible to bring specific sources into compliance within three years, the Governor of the State may request an extension of *the deadline* up to two years. The Administrator must be satisfied that alternate means of achieving the standard have been considered (including closing down the source in question), that all reasonable interim measures will be applied, and that the State is justified in seeking the extension.

A Governor may also apply for a postponement of *the deadline* if, when *the deadline* approaches, it is impossible for a source to meet a requirement under an implementation plan, interim control measures have reduced (or will reduce) the adverse health effects of the source, and the continued operation of the source is essential to national security or the public health or welfare of that State. Such postponement is subject to judicial review.

Neither the conference report nor Senator Muskie's Summary discussed the addition of Section 110(f)(3).

In sum, the language of the Amendments and their history strongly suggest that Section 110(f) was not intended to be the exclusive means of obtaining variances from a requirement of a state plan where the variance would not affect timely attainment or maintenance of national ambient air quality standards. Rather, Section 110(f) was aimed at post-

ponements that would affect a state's attainment of national standards within the prescribed deadlines; lesser variances, like other revisions of plans, could be approved by EPA pursuant to Section 110(a)(3).

B. EPA'S CONSTRUCTION OF THE ACT, ON WHICH THE STATES AND PERSONS SUBJECT TO THE ACT HAVE RELIED, PROPERLY EFFECTUATES THE LEGISLATIVE PURPOSE OF THE AMENDMENTS.

The Clean Air Amendments imposed upon newly-created EPA an ambitious legislative goal, a variety of substantial legal and technical obligations, and an unprecedented series of deadlines to meet in carrying out its statutory mandate under this comprehensive and complex legislation. While it was completing the first phase—promulgation of national air quality standards on April 30, 1971—EPA was also working towards the next stage—submission of state implementation plans. To assist the states in determining what it would regard as satisfying the requirements of Section 110(a)(2), in the spirit of cooperative federalism on which the Act is still based (42 U.S.C. 1857(a) (3) and (4)), EPA on April 7, 1971, published proposed guidelines for the preparation, adoption and submission of such plans. 36 Fed. Reg. 6680. After receiving comments by numerous organizations, including respondent NRDC, EPA issued final guidelines on August 14, 1971. 36 Fed. Reg. 15486; 40 C.F.R. Part 51.

One of the many questions of statutory interpretation to be resolved during the period in which the implementation plans had to be prepared, submitted and approved concerned the scope and relationship of

EPA's authority to approve "revisions" of plans under Section 110(a)(3) and "postponements" under Section 110(f), particularly as they related to compliance with control measures made effective prior to the deadline for attainment of national standards.

In light of the legislative history of Section 110(f), which indicated that it was aimed primarily at requests for relief arising after a plan was submitted that would affect attainment of the national standards within the three-year deadline,<sup>20</sup> EPA concluded that Section 110(f) had not been intended by Congress as the exclusive means of relief from requirements of plans when the compliance problems involved had not been accommodated by an extension of the deadline pursuant to Section 110(e) and would not prejudice the state's timely attainment of the standards. This conclusion is supported by several pragmatic considerations.

First, since Section 110(f) requires that formal hearings be held by EPA (cf. 38 Fed. Reg. 22025-22030, 27286-27287; 40 C.F.R. 51.33), in addition to any hearings held by the state, an overly-broad application of the postponement procedure could result in an enormous burden upon EPA, with consequent delays and diversion of resources needed for other vital

<sup>20</sup> In the original Senate bill the postponement provision explicitly applied only to the statutory deadline for attainment of national standards (see p. 24, *supra*), and the comments in the conference report and Senator Muskie's explanation of the conference bill do not suggest a substantially broader focus (see pp. 25-26, *supra*). See Laneburg, *Federal-State Interaction under the Clean Air Amendments of 1970*, 14 B.C. Ind. & Com. L. Rev. 637, 656 (1973).

aspects of EPA's work under the Act. Insofar as requests for relief were subject to the "revision" requirements, however, the burden of conducting public hearings was diffused among the affected states.

In addition, if a state were authorized to grant variances from the requirements of its plan prior to the statutory deadline only by resort to the postponement procedures of Section 110(f), it might well be inclined to defer the effective dates of its control measures until the latest feasible date consistent with attainment of the standards within the statutory deadline, rather than to make some or all control measures effective soon in the expectation that needed variances could be granted during the period prior to the deadline. Such a decision by a state to defer deadlines might reflect apprehension that the postponement procedures would be too slow and stringent to provide adequate relief during the preattainment period, as well as the belief that a postponement could be granted only for one year<sup>21</sup> and so could not adequately protect a source subject to a requirement made effective

<sup>21</sup> While the issue is not presented in this case, a question exists as to whether Section 110(f) permits only one postponement, since the Act does not explicitly authorize or prohibit successive postponements. The provision of the Senate bill on which Section 110(f) was largely based did explicitly permit multiple postponements of the deadline for attainment of a standard, but the omission of this seemingly significant language was not commented on in the conference report or the explanatory statement submitted by Senator Muskie (see pp. 25-26, *supra*).

at a date earlier than one year before the statutory deadline.<sup>22</sup>

Similarly, if Section 110(f) were the only means for obtaining variances from any requirement of a state plan, the states might be deterred from adopting control strategies more stringent than those needed merely to attain and maintain national standards, which Section 116 of the Act specifically permits them to do. 42 U.S.C. 1857d-1.

Accordingly, in light of the statutory mandate that the national standards should be attained "as expeditiously as practicable" within the three-year deadline, EPA adopted a construction of the Amendments that reasonably led towards that goal. Thus, EPA's proposed and final guidelines provided that a state's determination to defer the applicability of any portion of its control strategy in its plan to a source would be subject to the requirements for a postponement if the "deferral will prevent attainment or maintenance of a national standard" within the prescribed time (36 Fed. Reg. 6686, 22405; 40 C.F.R. 51.32(f)), although

<sup>22</sup> For example, Georgia and other states (see, *e.g.*, Pet. 6) made many requirements of their plans effective immediately in 1972, subject to relief under stringent variance procedures. This way most sources were subjected to controls long before the 1975 deadline, even though, as was recognized at the outset, some might require variances for most or all of the three-year period. A one-year postponement would not always help such a source, even if available, as the source might then be in violation for the balance of the three-year period. This problem would have been avoided if the state had deferred the effective date of all requirements under the plan until the attainment deadline (as Florida and others have done), thereby in effect basing overall controls on the lowest common denominator.



such a determination would be treated as a "revision" of the plan if it would not have that effect. See 36 Fed. Reg. 6681, 22400; 40 C.F.R. 51.6.

Neither respondent NRDC nor anyone else objected to this provision. Indeed, at subsequent congressional hearings concerning EPA's implementation of the Clean Air Amendments, held before EPA had approved the state plans, NRDC stated that Section 110(f) applied to "any variance which would prevent attainment \* \* \* of a national standard \* \* \*" and that the EPA guideline "correctly provides that variances which do not threaten attainment of a national standard are to be considered revisions of the plan \* \* \*." Hearings, on Implementation of the Clean Air Act Amendments of 1970—Part I (Title I), before the Subcommittee on Air and Water Pollution of the Senate Committee on Public Works, 92d Cong., 2d Sess., ser. no. 92-H31, p. 45 and n.51 (statement of Richard E. Ayres).

On the basis of EPA's then-unchallenged guidelines, Georgia and other states submitted implementation plans containing early effective dates and limited provision for variances. Such plans were approved by EPA in this regard—in many instances without challenge—and commitments and investments have been made by various sources in such states, and the states themselves, in reliance upon EPA's interpretation of the Act as permitting variances during the pre-attainment period subject to the procedures for "revisions" of plans.

Where, as here, EPA's interpretation of the "untried and new" provisions of the Amendments it was responsible for implementing "is not unreasonable," the language of the statute bears EPA's construction, that interpretation has "been a matter of public record;" and there has been action by others, "at very great expense, in reliance upon the \* \* \* interpretation," it should be shown "great deference" and sustained. *Udall v. Tallman*, 380 U.S. 1, 16-18; see, e.g., *Griggs v. Duke Power Co.*, 401 U.S. 424, 433-434; *Traffante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 210.

C. THE CONTENTION THAT SECTION 110(F) PROVIDES THE EXCLUSIVE MEANS FOR OBTAINING VARIANCES PRIOR TO THE DEADLINE FOR ATTAINING NATIONAL STANDARDS HAS BEEN REJECTED BY CONGRESS AND ALL OTHER COURTS OF APPEALS

The reasonableness of EPA's interpretation of the Act concerning the treatment of variances, and the validity of EPA's approval of the Georgia procedure in issue here, are both supported by the unsuccessful efforts of respondent NRDC to challenge them elsewhere.

At congressional hearings in 1972 concerning EPA's implementation of the Clean Air Amendments, NRDC specifically singled out the Georgia variance statute involved here as being an "extreme" example of provisions in state plans that NRDC believed to be inconsistent with the requirements of Section 110(a) (2). Hearings on Implementation, *supra*, at 45. Congress, however, took no action, either before or after EPA's approval of the Georgia plan, that would in

any way suggest that Georgia or EPA was not correctly carrying out the intent of Congress.

Moreover, after EPA had approved a number of state plans containing provisions for variances that, consistent with EPA's guidelines, need not in all cases satisfy the requirements of Section 110(f) for postponements, respondent NRDC challenged EPA's approvals of several such plans on various grounds. Apparently having changed its position (see p. 31, *supra*), NRDC contended that Section 110(f) "establishes the exclusive variance procedure." *Natural Resources Defense Council, Inc. v. Environmental Protection Agency*, 478 F. 2d 875, 884 (C.A. 1) ("NRDC-C.A. 1"). However, four of the five courts of appeals that have considered that claim have rejected it.

In NRDC-C.A. 1, involving challenges to EPA's approval of the Massachusetts and Rhode Island plans, the First Circuit concluded that "Congress [had not] intended altogether to preclude the Administrator [of EPA] from approving plans containing reasonable state deferral mechanisms during the preliminary [pre-attainment deadline] period." *Id.* at 887. The court stated (*ibid.*):

A state plan may well establish emission limitations or other requirements during the preliminary period which one or more sources simply cannot initially meet. A postponement under § 1857c-5(f), besides being limited to only one year, would require meeting a stricter standard than is suggested by the "as expeditiously as practicable" language § 1857c-5(a)

(2)(A). We can see value in permitting a state to impose strict emission limitations now, subject to individual exemptions if practicability warrants; otherwise it may be forced to adopt less stringent limitations in order to accommodate those who, notwithstanding reasonable efforts, are as yet unable to comply.

While not rejecting EPA's contention that such power was conferred by the revision authority of Section 110(a)(3), the court viewed "it more as a necessary adjunct to the statutory scheme, which anticipates greater flexibility during the pre-attainment period." *Ibid.*

As to the period *after* the deadline for attainment of national standards, however, the court concluded that a variance would ordinarily have to satisfy the requirements of Section 110(f) for postponements, which the court regarded as "the exclusive mechanism for hardship relief after the mandatory attainment dates." 478 F. 2d at 886. Nevertheless, recognizing a need for "flexibility" not afforded by Section 110(f) for such matters as "mechanical breakdowns and acts of God," the court added that a state plan may provide "for minor state and local deferral procedures" during the post-attainment period, if limited to a few months and containing standards and controls to preclude abuse. *Ibid.*<sup>23</sup>

<sup>23</sup> Since the Court granted certiorari in the present case, the Ninth Circuit has more broadly upheld EPA's interpretation of the Act, as reflected in the guidelines, that all variances need not satisfy the requirements of Section 110(f) for postponements. *Natural Resources Defense Council, Inc. v. Environmental Protection Agency*, No. 72-2145 (C.A. 9), decided November 11, 1974. That court specifically rejected the distinction drawn by the First Circuit between the periods prior to and after

Regarding the First Circuit's construction of the Act as a reasonable, workable one, albeit less desirable

the deadlines for attainment of national standards as having no foundation in the language of Section 110 or its history (see Comment, *Variance Procedures under the Clean Air Act: The Need for Flexibility*, 15 Wm. & M.L. Rev. 324, 331 (1973)), and concluded that the power of EPA to approve "minor" variances (*i.e.*, those that will not interfere with attainment or maintenance of national standards), is a necessary adjunct of the statutory scheme both before and after the attainment dates, without reliance upon the revision authority of Section 110(a)(3).

Moreover, the First Circuit's contrary conclusion is not supported by the legislative history on which it relied in stating (478 F.2d at 885-886):

It is plain from the legislative history that the expeditious imposition of "specific emission standards" and their "effective enforcement" were primary goals of the Clean Air Amendments. Report No. 91-1146, U.S. House of Representatives, 91st Cong. 2d Sess., pp. 1, 5 (1970) \* \* \* The Congressional intent could too easily be frustrated by the existence of open-ended exceptions. Sources of pollutants should either meet the standard of the law, or be closed down. Report No. 91-1196, U.S. Senate, 91st Cong. 2d Sess., p. 3 (1970).

The House report cited was commenting upon the House bill which, as noted (see p. 23, *supra*), did not contain explicit mandatory deadlines for attainment of emission standards or ambient air standards; nor did the House report indicate that "specific emission standards" could not be relaxed by joint federal-state action even where there would be no adverse affect upon attainment or maintenance of national ambient air standards. Similarly, the Senate report did not suggest that sources must close down if they cannot meet the *emission* standards or other elements of a state's control strategy. Rather, the report's statement that the sources "either should meet the standard of the law or be closed down \* \* \*" (S. Rep. No. 91-1196, *supra*, at 3) plainly has reference to the ambient air standards the report had just been discussing. *Id.* at 2-3. Nothing in the legislative history is inconsistent with the proposition that the variances from requirements of a state

than EPA's original construction, EPA did not ask this Court to review the First Circuit's decision and instead changed its regulations concerning the plans involved to conform to that decision. See 38 Fed. Reg. 18878-18880; 40 C.F.R. 52.1131, 52.2079. Later, EPA's general guidelines were themselves changed to reflect this interpretation, and EPA disapproved all state plans to the extent that they "permit the deferral of compliance with applicable plan requirements beyond the statutory attainment dates \* \* \*." 39 Fed. Reg. 34535; 40 C.F.R. 52.26(a).

The First Circuit's decision was followed by the Eighth Circuit (*Natural Resources Defense Council, Inc. v. Environmental Protection Agency*, 483 F. 2d 690, 693-694 (C.A. 8) (Iowa plan)) and the Second Circuit (*Natural Resources Defense Council, Inc. v. Environmental Protection Agency*, 494 F. 2d 519, 523 (C.A. 2) (New York plan)), neither decision resting upon any new analysis, and the latter expressly rejecting the reasoning of the court of appeals in this case (*ibid.*).

plan are permissible, apart from Section 110(f), if attainment or maintenance of national ambient air standards would not be affected.

Nor was the First Circuit's conclusion supported by its concern that to permit variances to be obtained other than as postponements under Section 110(f) would "invite protracted delay." 478 F. 2d at 886. While a source might well seek to litigate whether a variance in its favor would prevent attainment or maintenance of a national standard, the source would remain subject to the applicable requirements until a variance or revision were approved by both the state and EPA. Cf. *Getty Oil Co. v. Ruckelshaus*, 342 F. Supp. 1006, 1017-1019 (D. Del.), remanded on other grounds, 467 F. 2d 349 (C.A. 3), certiorari denied, 409 U.S. 1125.

Most recently, EPA's position that Section 110(f) is not the exclusive procedure governing variances, at least in the pre-attainment period, has been sustained by the Ninth Circuit, which, like the First Circuit, held that a sensible construction of the Act required that EPA be authorized, without using the procedures and standards of Section 110(f), to approve "minor" variances, *i.e.*, those not affecting attainment or maintenance of national standards. *Natural Resources Defense Council, Inc. v. Environmental Protection Agency*, No. 72-2145 (C.A. 9), decided November 11, 1974, slip op. pp. 5-13 (Arizona plan). Moreover, the court held that this authority was not limited to the pre-attainment period (see p. 34, *supra*, n. 23).<sup>24</sup> The court stated that if EPA lacked authority to approve such minor variances apart from Section 110(f), it would be "difficult to perceive any just basis for the Act's exhortation to the states to promulgate implementation plans even stricter than that required to attain national ambient air standards. See 42 U.S.C. § 1857d-1." Slip Op. p. 9.<sup>25</sup> Disagreeing with the decision of the court of appeals in the instant case, the Ninth Circuit could find no "congressional intent to establish section 110(f) as the exclusive mechanism by

<sup>24</sup> Indeed, the court stated that its interpretation of the Act precludes EPA's rejection of a state plan on the ground that it permits "the issuance of 'minor' variances under a procedure other than that specified in section 110(f)." Slip Op. p. 13 (footnote omitted).

<sup>25</sup> NRDC has elsewhere acknowledged that under the Act "States are not only free but encouraged to set tighter standards and reach these standards at an earlier date than required by Federal law." Hearings on Implementation, *supra*, at 17.

which all changes of particular application may be accomplished." *Id.* at 12.

D. THE DECISION OF THE COURT OF APPEALS RESTS UPON AN ERRONEOUS ANALYSIS OF THE LANGUAGE AND PURPOSE OF THE CLEAN AIR ACT.

The court of appeals' conclusion that Section 110(f) is the exclusive procedure governing variances stems, first, from a serious misreading of the language of Section 110(f). Noting that Section 110(f) provides that a postponement may be granted with respect to the date that "any" source must comply with "any" requirement of a state plan, the court erroneously concluded that Section 110(f) is the exclusive procedure governing "all particular changes" in the applicability of the requirements of a plan (Pet. App. 21a-22a; emphasis in original). However, especially in light of other provisions of the Act, this language in Section 110(f) is more persuasively read as merely authorizing postponements as to "any" requirement, but not mandating that all modifications of such requirements necessarily be treated as postponements subject to Section 110(f).

Second, in asserting that nothing in the Act supports the construction of Section 110(f) as not applying to a variance that does not threaten attainment of a national standard (Pet. App. 21a), the court gave no weight to the authority in the Act concerning revisions. The court erroneously disposed of the revision provision of Section 110(a)(3) with the *ipse dixit* that there was a "familiar and clear" distinction between a revision, which "is a change in a



generally applicable requirement," and a postponement or variance, which is "a change in the application of a requirement to a particular party" (*ibid.*). In adopting this distinction, for which it cited no authority, the court ignored the legislative history indicating that the use of the term "postponements" in Section 110(f) had reference primarily to deadlines for attaining national standards, and it gave no weight, let alone deference, to the interpretation of EPA, the agency responsible for implementing the Act.

The court's other premise was "that the plan of the statute was to secure ambitious commitments at the planning stage, and then, by making it difficult to depart from those commitments, to assure that departures would be made only in cases of real need" (Pet. App. 26a; see *id.* at 22a-23a). The court's conclusion, however, does not follow from that premise. As suggested above (see pp. 29-30, 33-34, 37, *supra*), one significant means of securing "ambitious commitments at the planning stage" was for states to make their plans more stringent than needed to attain national standards or generally effective at an earlier date than required for timely attainment of those standards, providing for exceptions in cases of real hardship. Since an excepted source could not rely on the continuation of such an exception past the attainment deadline, it would be no better off than if the state had deferred effective dates until the latest date, an approach that might well have tended to produce less

ambitious overall commitments at the pre-attainment planning stage.

Finally, the court of appeals took issue with the statement of the First Circuit in *NRDC-C.A. 1* that "provision for a three-year grace period, followed by the possibility of a further two-year extension [under Section 110(e)], indicates that Congress did not expect immediate achievement of standards." 478 F. 2d at 887. The court below stated (Pet. App. 26a):

This statement, however, contains a crucial ambiguity, and it supports the First Circuit's holding only if that ambiguity is overlooked. It is of course true that the provision of a three-year grace period, and of the possibility, however limited, of an extension, do mean that Congress did not expect immediate achievement of *ambient* standards. But it does *not* follow that Congress did not contemplate that *emission* standards would not have to be met "immediately" as their scheduled dates—set by the implementation plan—arrived.

While it may not follow merely from these provisions that Congress did not contemplate that emission standards (or other aspects of a state's control strategy) would not have to be met as their scheduled dates arrived, it also does not follow that Congress intended such dates to be as inflexible as sole reliance on Section 110(f) as the means of change would leave them, in cases where compliance presented severe interim problems and an *ad hoc* relaxation of the standard would not interfere with the state's attainment or maintenance of national standards. To the contrary, while the Act as a whole gives the states no discretion concerning the national ambient standards to be promulgated by EPA, they were accorded substantial

latitude in determining the precise emission standards or other elements of the control strategy to be used in attaining and maintaining those standards, and the timing of their implementation.

In short, even if there is an ambiguity in the First Circuit's statement concerning "standards," it is not "crucial" because it is also clear that Congress did not expect immediate achievement of emission standards.

E. IN REJECTING EPA'S CONSTRUCTION OF SECTION 110, THE COURT OF APPEALS' HOLDING WOULD HAVE ADVERSE CONSEQUENCES NOT INTENDED BY CONGRESS.

The First Circuit's decision that Section 110(f) is the exclusive procedure for variances in the post-attainment period has been criticized as providing "a compelling argument against state adoption of regional emission limitations stricter than those required for attainment and maintenance of national [ambient air] standards." Comment, *Variance Procedures under the Clean Air Act: The Need for Flexibility*, 15 Wm. & M. L. Rev. 324, 337 (1973). That criticism is equally true of the court of appeals' decision in this case concerning the pre-attainment period. Moreover, the court's construction of Section 110, if it had been adopted by EPA at the outset, would also have tended to deter states from adopting deadlines for the requirements of their plans earlier than the mid-1975 attainment deadlines (see pp. 29-30, *supra*). Since states like Georgia, which chose to make various requirements effective early, may have obtained the necessary support for such stringent measures only because a limited variance procedure was available, it would seem unfair to those states, and to

the thousands of sources operating pursuant to variances approved by EPA as revisions of state plans pursuant to Section 110(a)(3), to hold that they have acted in vain because Section 110(f) governs exclusively.

As one commentator has said, "it is difficult to imagine a more cumbersome and time-consuming variance mechanism than that under section 110(f) \* \* \*." Comment, *supra*, 15 Wm. & M. L. Rev. at 334. While such a difficult procedural hurdle may well be justified with respect to efforts to postpone requirements of a state plan that will interfere with timely attainment or maintenance of the mandatory standards, there is no reason to suppose that Congress would have intended such a mechanism to govern all minor variances, particularly in the pre-attainment period.

Substantial delays would have been inevitable if EPA had been required itself to hold formal public hearings<sup>26</sup> and satisfy Section 110(f) as to all variances, of which there have been 800 in Georgia alone. Although EPA has as yet processed only a few requests for postponements under Section 110(f), experience thus far indicates that the disposition of each such request will be time-consuming and will absorb substantial amounts of EPA's limited resources.<sup>27</sup>

<sup>26</sup> EPA's regulations provide that hearings pursuant to Section 110(f) shall comply with the procedural requirements of 5 U.S.C. 554 for adjudications. See 38 Fed. Reg. 22025-22030, 27286-27287; 40 C.F.R. 51.33.

<sup>27</sup> For example, a request submitted by the Governor of West Virginia on June 13, 1973 (38 Fed. Reg. 27319, 30136), is still pending. Having held formal public hearings on the request in January, February and October 1974, EPA is awaiting a recom-

If the court of appeals' decision were sustained, EPA arguably would be required to hold formal public hearings as to many, if not all, of the 800 Georgia variances already submitted to EPA, even if they have already been the subject of public hearings held by the state. A similar result might also follow as to the balance of the 3000 variances submitted to EPA by other states in the Fifth Circuit alone.<sup>28</sup>

For many sources, particularly in the pre-attainment period, it may not be reasonably possible to comply with some requirement of a state plan by its effective date, because, for example, more time is needed to devise or procure the necessary control mechanisms. Yet, because of the one-year limitation and the substantive standards of Section 110(f), wholesale application of that provision to all requests for variances would have the result that many sources would be in violation and might face burdensome litigation, with the risk of being shut down, even though the variance sought would not interfere with attainment or maintenance of national standards. "Such a result appears unduly harsh, particularly in the absence of an explicit manifestation of congressional

intention by the administrative law judge. A request submitted by the Governor of Nevada on August 29, 1973 (38 Fed. Reg. 34020), was not approved until July 10, 1974.

<sup>28</sup> We do not think it necessary to resolve here the consequences of affirmance of the decision below for other plans not challenged in the Fifth Circuit (or elsewhere), or for the plans involved in the cases sustaining EPA's power to approve variances apart from Section 110(f). Those questions present potentially difficult legal and practical problems not before the Court in this case and not considered by the court below.

intent on the question." Comment, *supra*, 15 Wm. & M. L. Rev. at 336. See, also Lunenburg, *Federal-State Interaction under the Clean Air Amendments of 1970*, 14 B.C. Ind. & Comm. L. Rev. 637, 651, 653 (1973).

Because it would thus undesirably restrict the flexibility of the states and EPA in assuring the adoption and enforcement of control strategies for attaining and maintaining the national ambient air standards, the holding below should not be sustained. We submit that EPA's interpretation of the Clean Air Act as not requiring that all variances from requirements from state plans be subjected to the requirements of Section 110(f), and as permitting variances to be treated as revisions under Section 110(a) (3) if they will not interfere with timely attainment or maintenance of national standards, is not only consistent with the language, history and intent of the Act, but represents sound policy in the effort to achieve all of the Act's purposes. Accordingly, the decisions of the First, Second, Eighth and Ninth Circuits should be upheld, insofar as those courts have construed the Act as giving EPA authority to approve variances without resorting to Section 110(f), although we believe that EPA reached that conclusion through a preferable route.<sup>29</sup>

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<sup>29</sup> Although these courts have stated that variances not subject to Section 110(f) must be approved by EPA, there is no explicit statutory basis for that requirement other than the revision authority of Section 110(a) (3), on which the courts did not rely. Moreover, under Section 110(a) (3), the states are obliged to provide an opportunity for a public hearing and EPA's approval is subject to judicial review (see p. 21, *supra*).

The holding below, moreover, would result in unwarranted constriction of state autonomy to determine how the national standards should be attained and implemented within each state. In providing for national air quality standards, Congress plainly meant to establish national ends to be achieved. But it did not intend comparably to nationalize decision-making about the means for achieving those ends—decisions whose economic, social and political dimensions are of particular concern to the states and localities most immediately affected by them.

Finally, there is no evidence—and the court below did not suggest—that EPA's treatment of variances has resulted in abuses. As noted, the state itself must first have provided an opportunity for a public hearing—as the Georgia law in issue here requires (see pp. 3-4, *supra*, n. 2).<sup>30</sup> Then, EPA publishes notice of requests for variances and invites comments. Nor does EPA grant rubber-stamp approval of such requests: there have been significant published denials.<sup>31</sup> And, although EPA has now approved thousands of variances pursuant to Section 110(a)(3), not one such approval has been successfully challenged in court.<sup>32</sup>

<sup>30</sup> Indeed, in some states requests for revisions are submitted by the governor, as requests for postponements must be. See *e.g.*, 39 Fed. Reg. 16348.

<sup>31</sup> See, *e.g.*, 37 Fed. Reg. 23837; 39 Fed. Reg. 16348, 30834.

<sup>32</sup> The reasonableness of the use being made of variances by the states and EPA is indicated by the fact that a great many variances have been for periods shorter than the entire period prior to the attainment deadline and many have already expired. *E.g.*, 39 Fed. Reg. 16348-16349, 35335-35343.

**CONCLUSION**

For the foregoing reasons, the judgment of the court below should be reversed.

Respectfully submitted.

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NOVEMBER 1974.



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# In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1742

RUSSELL E. TRAIN, ADMINISTRATOR, UNITED  
STATES ENVIRONMENTAL PROTECTION AGENCY,  
*Petitioner,*

vs.

NATURAL RESOURCES DEFENSE COUNCIL, INC.,  
*Respondent.*

## AMICUS CURIAE BRIEF OF STATE OF MISSOURI

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## AMICUS CURIAE BRIEF OF STATE OF MISSOURI

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### INTEREST OF AMICUS CURIAE

This case presents the question whether under the Clean Air Act, 42 U.S.C. §1857, *et seq.*, variances from particular requirements of the state implementation plans are allowed, or whether Section 110(f) of the Act, 42 U.S.C. §1857c-5(f), is the only vehicle for deferring the application of a standard, limitation, time schedule or other requirement of a state implementation plan.<sup>1</sup> The State of

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1. 42 U.S.C. §1857c-5(f) authorizes the Governor to apply for, and EPA to approve, a postponement of any requirement of an applicable implementation plan for a period of one year upon certain conditions. This postponement can be requested only up to the date on which a source or class of sources is required to meet the applicable requirement.

Section 110(e) of the Act, 42 U.S.C. §1857c-5(e), provides for an extension of the date for attaining a national primary ambient air quality standard for a period of up to two years beyond the three-year date specified by 42 U.S.C. §1857c-5(a)(2)(A)(i). However, 42 U.S.C. §1857c-5(e) is not at issue in this case, as an application for such extension can be made only at the time a state implementation plan is submitted. The deadline for submission of such plans was May 31, 1972.

Missouri, through the Missouri Air Conservation Commission, is responsible for formulating and enforcing its implementation plan. The state's Air Pollution Control Law, Sections 203.010 to 203.195, RSMo 1969, as amended, contains a variance procedure similar to that of the State of Georgia, and almost identical to that of *amicus curiae*, State of Texas."

2. §203.110:

"1. The commission may grant individual variances beyond the limitations prescribed in this chapter whenever it is found, upon presentation of adequate proof, that compliance with any provision of this chapter or any rule or regulation, standard, requirement, or order of the commission or executive secretary will result in an arbitrary and unreasonable taking of property or in the practical closing and elimination of any lawful business, occupation or activity, in either case without sufficient corresponding benefit or advantage to the people; except, that no variance shall be granted where the effect of the variance will permit the continuance of a health hazard; and except, also, that any variance so granted shall not be so construed as to relieve the person who receives the variance from any liability imposed by other law for the commission or maintenance of a nuisance.

2. In determining under what conditions and to what extent a variance may be granted, the commission shall exercise a wide discretion in weighing the equities involved and the advantages and disadvantages to the applicant and to those affected by air contaminants emitted by the applicant.

3. Variances shall be granted for such period of time and under such terms and conditions as shall be specified by the commission in its order. The variance may be extended by affirmative action of the commission.

4. Any person seeking a variance shall do so by filing a petition for variance with the executive secretary. The executive secretary shall promptly investigate the petition and make a recommendation to the commission as to the disposition thereof. Upon receiving the recommendation of the executive secretary, if the recommendation is against the granting of a variance, a hearing shall be held if requested as provided in section 203.100. If the recommendation of the executive secretary is for the granting of a variance, the commission may do so without a hearing; except, that upon the petition of any person aggrieved by the granting of the variance, a hearing shall be held as provided in section 203.100. In any hearing under this section, however, the burden of proof shall be on the person petitioning for a variance.

5. Upon failure to comply with the terms and conditions of any variance as specified by the commission, the variance may

(Continued on following page)

In addition to the general concern of the State of Missouri that variance procedures be upheld under the Clean Air Act, and that those persons who hold variances from the Missouri Air Conservation Commission not be faced with enforcement action because they have in good faith relied on the variances granted them, Missouri has another interest in the instant case. There is presently pending in the United States Court of Appeals for the Eighth Circuit a petition by the Union Electric Company, the major supplier of electric power for the St. Louis area, for review of the sulfur dioxide regulations of the Missouri implementation plan.<sup>3</sup> The State of Missouri has intervened in the Union Electric case, and has presented the Court of Appeals with the suggestion that since the Missouri Air Conservation Commission has not passed on Union Electric's applications for variances from the sulfur dioxide regulations, the petition should be dismissed, or held in abeyance, until the state has the opportunity to do so.<sup>4</sup> If this Court were to affirm the decision of the Court of Appeals below, Missouri would of course be foreclosed from making this contention.

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Footnote Continued—

be revoked or modified by the commission after a hearing held upon not less than thirty days' written notice. The notice shall be served upon all persons who will be subjected to greater restrictions if the variance is revoked or modified, or who have filed with the executive secretary a written request for notification."

3. *Union Electric Co. v. Environmental Protection Agency*, No. 74-1614, 8th Cir., petition filed August 19, 1974. Oral argument on the question of jurisdiction will be heard on January 10, 1975.

4. This position is based on language in *Getty Oil Co. v. Ruckelshaus*, 467 F.2d 349 (3d Cir. 1972), which indicates that the Courts of Appeals may not review a state regulation if the state has not yet passed on a variance request.

## ARGUMENT

### **Congress Did Not Intend to Foreclose the States from Granting Variances from Their Respective Implementation Plans Where Such Variances Would Not Interfere with the Attainment and Maintenance of National Ambient Air Quality Standards.**

The basic question before this Court is whether the Clean Air Act leaves room for the states to grant certain types of variances from their respective implementation plans. Counsel for the State of Missouri trusts that the parties to this case will present the relevant case law and statutory citations, and, therefore, Missouri has no need to present a lengthy brief on the subject. However, Missouri is concerned that the opinion of the Court of Appeals for the Ninth Circuit be presented to the Court as the correct construction of the Clean Air Act.

That opinion, *Natural Resources Defense Council, Inc. v. Environmental Protection Agency*, No. 72-2145 (9th Cir., Nov. 11, 1974), held that minor variances (those variances which will not interfere with the attainment and maintenance of national ambient air quality standards) could be granted even beyond the date specified by 42 U.S.C. §1857c-5(a)(2)(A)(i). This opinion goes beyond the positions taken by the First, Second and Eighth Circuits,<sup>5</sup> and beyond the position now taken by EPA.<sup>6</sup> Missouri sub-

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5. *Natural Resources Defense Council, Inc. v. Environmental Protection Agency*, 478 F.2d 875 (1st Cir. 1973); *Natural Resources Defense Council, Inc. v. Environmental Protection Agency*, 483 F.2d 690 (8th Cir. 1973); *Natural Resources Defense Council, Inc. v. Environmental Protection Agency*, 494 F.2d 519 (2d Cir. 1974).

6. 40 C.F.R. §§51.11(g), 51.15(d), 51.32(f). Prior to the 1st Cir. Opinion, EPA had taken the position that variances which did not interfere with the attainment and maintenance of national standards would be permitted as revisions of the implementation plan during both the pre-attainment and post-attainment periods. 40 C.F.R. §§51.6, 51.32(f).

mits that the proper construction of the Clean Air Act would allow minor variances (those variances not interfering with attainment and maintenance of national standards) both before and after the mandatory attainment date, and that the decision whether to grant such variances is left by the Act to the respective states.

It is the position of the State of Missouri that 42 U.S.C. §1857c-5(f) was not intended by Congress to be the exclusive means of granting relief from a particular requirement of an implementation plan, where a source of emissions cannot comply with the plan because of technological infeasibility. This position is based on the proposition that the attainment and maintenance of national ambient air quality standards, and not emission limitation, is the basic goal of the Act, and that under the Clean Air Act, as amended, the primary responsibility for attainment and maintenance of the national standards still resides in the states. These propositions are adequately supported by a reading of the Clean Air Act as a whole, rather than narrowing the inquiry to an analysis of the specific language of 42 U.S.C. §1857c-5(f) alone. The United States has thoroughly covered these points in its brief, and Missouri will not burden the Court with a repetition of these arguments. Instead, Missouri will argue that the rationale of the Ninth Circuit should be adopted by this Court.

As discussed above, the Ninth Circuit has held that the Clean Air Act does not prohibit the states from granting variances from particular requirements of implementation plans, where such variances will not interfere with the attainment and maintenance of ambient air quality standards. The State of Missouri believes that the Ninth Circuit position is the only logical one to take when the practical effects of the other positions are considered.



The effects of the other positions before the Court can readily be seen from the following situation. A large electric utility, supplying 99 percent of the electric power to a metropolitan area of 1.8 million people, is in violation of specific emission limitations (set by state regulations) at the mandatory attainment date. However, the national ambient air quality standards for that pollutant are not being exceeded for the metropolitan area. The utility finds that it is unable to apply those emission control techniques required to bring its emissions of the particular pollutant within state regulation limitations, because the technology for such controls has not been developed, or because shortages of fuels and/or control equipment make compliance with the state emission limitation impossible at the present time.<sup>7</sup>

Faced with this situation, the utility has a choice. Under the positions taken by the United States and Natural Resources Defense Council, Inc., it can either continue to operate in violation of the emission limitation and face large fines for such violations, or it can shut down its operations, thereby causing a substantial, even massive disruption of the regional economy and a threat to the public welfare. We submit that Congress did not intend such a result and that the Clean Air Act cannot be read to mandate such a result.

Accepting the proposition that the regulatory scheme of the Act is designed to force the development of new air

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7. Although at the moment hypothetical, we believe that this set of facts could exist in Missouri on June 1, 1975, with respect to sulfur dioxide emission limitations. The hypothetical assumes that the one-year postponement provided in 42 U.S.C. §1857c-5(f) was not taken advantage of. The same situation could well exist on June 1, 1976, after the one-year postponement had expired, even if the postponement were applied for and granted.

pollution control technology, Congress could not have intended that substantial economic disruption should occur, where the national ambient air quality standards are being met and maintained, simply to achieve an emission limitation which was ambitiously set at a level more stringent than necessary. The national ambient air quality standards, by definition, are set at a level which will protect the public health and welfare. If the public health and welfare are being adequately protected in an air control region, then it is illogical to enforce a more stringent emission limitation against a source which cannot comply with it," especially when economic disruption detrimental to the public welfare will result.

Under the construction of the Clean Air Act, advanced by the parties to the case at bar, there is almost no flexibility in the Act to meet the exigencies of a situation where technology has not advanced as rapidly as anticipated in 1970. With the mandatory attainment date fast approaching,<sup>10</sup> there are still technological hurdles to be crossed in order to effectively control certain pollutants such as the

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8. 42 U.S.C. §1857c-4(b).

9. To some extent we are also talking about a situation where compliance with an emission limitation more stringent than necessary to meet national standards is technologically feasible, but economically infeasible. In some situations the cost of compliance could reach a point where it would have an economic impact outweighing the benefit to the public from extra increments of emission reduction. In such cases, we submit that the states should have the authority and responsibility to strike the balance between costs and benefits.

10. The mandatory attainment date for national primary ambient air quality standards in most states is May 31, 1975. 40 C.F.R. Part 52. In addition, a number of states must also meet secondary standards by that date. 40 C.F.R. Part 52.

photochemical oxidants.<sup>11</sup> And clean fuels are in shorter supply than anticipated in 1970. There seems to be little chance that some of the technological and resource supply problems will be resolved by mid-1975, or even mid-1976. Yet the positions of the First, Second and Eighth Circuits are that no later than mid-1976 (for most states) all sources must comply with emission limitations, even if national standards have been met and are being maintained. The position of the Fifth Circuit is, of course, even more restrictive.

Missouri submits that with regard to the issue before the court, the only logical construction of the Clean Air Act is that placed on it by the Ninth Circuit. That is, that 42 U.S.C. §1857c-5(f) is not the exclusive means of achieving flexibility in enforcement of state implementation plans. Instead, a state may grant a minor variance (one which does not interfere with the attainment and maintenance of national standards) even after the mandatory attainment date. Any other construction of the Act will result in absurd consequences,<sup>12</sup> and Congress cannot be presumed to have intended such absurdities.

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11. In addition, there is a great dispute between the EPA and the electric power industry as to whether the technology for controlling sulfur dioxide emissions is presently available. Furthermore, assuming EPA's position is correct that the technology for controlling sulfur dioxide emissions is now presently available, common sense dictates that all power plants in the United States cannot be brought into compliance by mid-1976, simply because it is physically impossible to complete such a massive construction program by mid-1976. Therefore, no matter what it is called, variances will have to be granted from such mandatory dates.

12. Major industrial and utility facilities closing down or paying large fines, even though the public health and welfare is being protected (because national ambient air quality standards are being met) and compliance within an emission limitation is impossible or economically ruinous, is, we submit, absurd.

Admittedly, all sources must comply with the national ambient air quality standards on the mandatory attainment date (unless a one-year postponement is granted pursuant to 42 U.S.C. §1857c-5(f)). Yet there is no statutory language which would suggest that minor variances be treated any differently after the attainment date than before such date. In fact the Act, in implicitly encouraging the states to adopt implementation plans more stringent than necessary to achieve and maintain the national standards,<sup>13</sup> would seem to require post-attainment flexibility. And it has been postulated that 42 U.S.C. §1857c-5(f) itself requires a uniform approach to pre-attainment and post-attainment variances.<sup>14</sup> We see no basis in the Act for a different treatment of pre-attainment and post-attainment variances.

An alternative to the granting of minor variances in cases of technological or economic infeasibility is, of course, a relaxation (lowering) of emission limitations to the bare minimum.<sup>15</sup> The difficulty with this approach is that it lowers air pollution control for all sources to the lowest common denominator. This approach flies in the face of reason and the provisions of 42 U.S.C. §1857d-1.<sup>16</sup>

13. 42 U.S.C. §1857d-1; Comment, *Variance Procedures Under The Clean Air Act: The Need For Flexibility*, 15 Wm. and M. L. Rev. 324, 336-337 (1973).

14. *Id.*; see also *Natural Resources Defense Council, Inc. v. Environmental Protection Agency*, *supra*, Slip Opinion pp. 7-8.

15. EPA has suggested (at least implicitly) this approach in certain informal publications.

16. Footnote 13, *supra*; 42 U.S.C. §1857d-1 provides:

"Except as otherwise provided in sections 1857f-6a, 1857f-6c(c)(4), and 1857f-11 of this title (preempting certain State regulation of moving sources) nothing in this chapter

(Continued on following page)

Does it not make more sense to set emission limitations at levels which make an effort to improve ambient air quality, and make judicious use of minor variances to accomodate cases where the stringent limitations cannot be met for a period of time, than to require all sources to meet only the minimum levels of emission reduction necessary to protect the public health and welfare?

We submit that 42 U.S.C. §1857d-1 provides, at the least, that the respective states have the option to enact such a scheme of regulation. Otherwise, Congress would have had no reason to specifically provide in that section for state regulation and enforcement of emission limitations in the terms there provided. Congress could not have intended to enact a regulatory scheme encouraging innovation and progressive regulation, yet prohibit any flexibility after the scheme takes final effect.

It might also be suggested that the flexibility required to meet technological and economic reality could be provided by a judicious delay of enforcement, or the use of schedules of compliance in enforcement orders, by EPA.<sup>17</sup>

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Footnote Continued—

shall preclude or deny the right of any State or political subdivision thereof to adopt or enforce (1) any standard or limitation respecting emissions of air pollutants or (2) any requirement respecting control or abatement of air pollution; except that if emission standard or limitation is in effect under an applicable implementation plan or under section 1857c-6 or section 1857c-7 of title, such State or political subdivision may not adopt or enforce any emission standard or limitation which is less stringent than the standard or limitation under such plan or section."

17. EPA has suggested the use of such a scheme in its publication "National Strategy For Control of Sulfur Oxides From Electric Power Plants", pp. 16-17, 23-24 (Washington, D.C., July 1974).

This would amount, in effect, to EPA's granting of variances to individual sources. We feel, however, that this scheme is less desirable than state variance procedures, because state variances are granted after public hearing. EPA, on the other hand, need not hold a hearing, or otherwise subject a proposed enforcement order to public scrutiny. In addition, state variances can be granted only for certain specified reasons,<sup>18</sup> while EPA's standards of granting compliance delays are known only to them. We submit that state variance procedures, with approval of the variance by EPA,<sup>19</sup> is a more equitable procedure, less susceptible to abuse, and is a procedure contemplated by Congress when it enacted the Clean Air Act.

## CONCLUSION

Amicus Curiae, the State of Missouri, submits that 42 U.S.C. §1857c-5(f) is not the exclusive method whereby compliance with particular requirements of a state implementation plan may be deferred if national ambient air quality standards are being met and maintained. Rather, the Clean Air Act allows the states to grant minor variances, subject to EPA approval, both before and after the mandatory attainment dates provided in 42 U.S.C. §1857c-5(a)(2)(A). Any other reading of the Clean Air Act would plainly defeat the intent of Congress to encourage the states to set emission limitations and compliance dates more stringent than required to meet national ambient air

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18. See Appendix p. 1.

19. Variances are presently treated as revisions of the state implementation plan, 40 C.F.R. §51.6.

quality standards, and would result in inequitable, absurd and economically disastrous consequences.

Respectfully submitted,

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RUSSELL E. TRAIN, Administrator, United States Environmental Protection Agency, and UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

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NATURAL RESOURCES DEFENSE COUNCIL, INC.,  
SAVE AMERICA'S VITAL ENVIRONMENT,  
JANEY WEBER, SUSANNE ALLSTROM,

*Respondents.*

On Writ of Certiorari to the United States Court of Appeals  
for the Fifth Circuit

**BRIEF FOR RESPONDENTS**

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1974

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No. 73-1742

RUSSELL E. TRAIN, Administrator, United States Environmental Protection Agency, and UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

*Petitioners,*

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC.,  
SAVE AMERICA'S VITAL ENVIRONMENT,  
JANEY WEBER, SUSANNE ALLSTROM,

*Respondents.*

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On Writ of Certiorari to the United States Court of Appeals  
for the Fifth Circuit

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**BRIEF FOR RESPONDENTS**

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**STATEMENT**

This case involves the interpretation of § 110(f) of the Clean Air Amendments of 1970, 42 U.S.C. § 1857c-5 (f), which addresses the treatment of air pollution sources that fail to meet previously agreed-to timetables for compliance with the requirements of State Implementation Plans adopted under the Act. Respondents contend that

§ 110(f) should be read as written, so that all requests by individual sources for additional compliance time should be tested by the standards of the federal law. The government, though it published regulations largely in agreement with this view on September 26, 1974, now urges that such requests should be tested by the far more lax standards and procedures of State variance laws, unless, in the judgment of the Environmental Protection Agency ("EPA"), such a request would cause a violation of a National Ambient Air Quality Standard. This condition appears nowhere in the Act, and is utterly inconsistent with its history, structure, and policies. If adopted, it would undermine the most crucial and innovative aspects of the Act, sap its effectiveness, permit continued increases in emissions, and thus assure additional deaths, disease and economic injury among millions of American citizens.

#### **A. The Consequences of Failing to Meet the Act's Requirements.**

The Clean Air Amendments are strong legislation, commensurate with Congress' sharp perception of the gravity of the threat to public health and the environment posed by the rapidly increasing emissions of pollutants. For example, emissions of sulfur oxides, one of the most common and deadly pollutants, from steam electric power generating facilities increased seven-fold in the period 1940-1970, from 3 million tons to 20 million tons per year nationally, and in recent years have been rising by over 1 million tons each year.<sup>1</sup> If the accelerating growth in emissions of this pollutant from power plants continues as it has, the Environmental Protection Agency projects that sulfur oxide emissions

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<sup>1</sup> U.S. Environmental Protection Agency, *Nationwide Air Pollutant Emission Trends, 1940-1970*, AP-115 5, Table 3 (1973).

will reach 41 million tons per year by 1980, *thirteen times* their 1940 levels.<sup>2</sup>

The full cost to society of these emissions is, obviously, difficult to establish exactly, but the estimates of the monetary toll alone show it to be substantial. In 1973, the President's Council on Environmental Quality ("CEQ") estimated the quantifiable costs of air pollution in 1968 at some \$16 billion annually,<sup>3</sup> a figure which is generally conceded to be roughly accurate.<sup>4</sup> Such figures cannot, of course, fully express the suffering by those afflicted with pollution-induced lung and heart diseases. A recent analysis, done jointly by Cornell University economists, utility industry representatives, and EPA staff for the Federal Power Commission estimated that unless power plant emissions are greatly curtailed, the continued growth in generating capacity will assure violation of the Clean Air Act's standards. The analysis concluded that the failure to meet the National Air Quality Standards would have the gravest consequences for public health:

The adverse health effects of not meeting clean air standards will be considerable. The number of premature deaths may reach over 6,000 per year by

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<sup>2</sup> U.S. Environmental Protection Agency, National Environmental Research Center, *Summary Report on Suspended Sulfates and Sulfuric Acid Aerosols*, Research Triangle Park, North Carolina (1973), 39, quoting "Abatement of Sulfur Oxide Emissions from Stationary Sources," National Academy of Engineering, COPAC-2.

<sup>3</sup> U.S. Council on Environmental Quality, *Environmental Quality: The Fourth Annual Report of the Council on Environment Quality*, 77-78 (1973).

<sup>4</sup> Report by the Coordinating Committee on Air Quality Studies, National Academy of Sciences, prepared for the Committee on Public Works, U.S. Senate, *Air Quality and Automobile Emission Control*, Volume I, 121 (1974).

1980 and the total excess between 1975 and 1980 could exceed 25,000.<sup>5</sup>

It is this sort of information which led the Senate Public Works Committee, primary authors of the 1970 Amendments, to summarize the reasons for their proposed Amendments as follows:

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<sup>5</sup> The *Report* went on to describe the other effects that could be expected if the National Standards were not met:

Each year an average elderly person will experience an unnecessary 5 to 10 days when his chronic heart and lung disorders will be perceptibly aggravated. If standards are not met, the excess number of aggravation days for our senior citizens would be 20 to 30 million days each year and total over 160 million days during the years 1975 to 1980. Each year a typical asthmatic might expect one to two unnecessary asthma attacks. If standards are not met, the excess number of asthma attacks would be 6 to 10 million each year and could total over 50 million during the years 1975 through 1980. Each year otherwise healthy children would experience 400 to 900 thousand and more common but severe acute respiratory disorders like croup, acute bronchitis and pneumonia. Between 1975 and 1980 children would be burdened with more than 4,500,000 excess acute respiratory illnesses if standards are not met. If standards are not met, adults would be burdened more frequently with persistent chronic respiratory disease symptoms. In 1975 an excess of more than 900,000 adults would be involved and by 1980 an excess of over 1,500,000 adults might be expected to report persistent chronic respiratory disease symptoms.

It concluded:

In summary, present rough estimates conclude that substantial excess adverse health effects can be expected each year if standards are not met: thousands of premature deaths, millions of days of illness among susceptible segments of the population, hundreds of thousands of needless acute lower respiratory illnesses in otherwise healthy children and hundreds of thousands of chronic respiratory disorders among adults.

Chapman, et al., *Power Generation: Conservation, Health, and Fuel Supply, A Report to the Task Force on Conservation and Fuel Supply, Technical Advisory Committee on Conservation of Energy*, National Power Survey, U.S. Federal Power Commission 17-18 (1973).

The Committee's concern with direct adverse effects upon public health has increased since the publication of air quality criteria documents for five major pollutants . . . . These documents indicate that the air pollution problem is more severe, more pervasive, and growing at a more rapid rate than was generally believed.

S. Rep. No. 91-1196, 91st Cong., 2d. Sess. 1 (1970).

At the same time, those who have studied the problem generally agree that the cost of controlling air pollution is less than the cost it imposes on the nation. The CEQ estimates that unless pollution is controlled, the damages from all sources of air pollution will amount to some \$24.9 billion annually by 1977.<sup>6</sup> Yet EPA estimates that the cost of abating air pollution will not exceed \$14 billion annually for the next five years.<sup>7</sup>

#### **B. History of the Clean Air Amendments of 1970.**

The 1970 Amendments represent a major break with prior federal air pollution control efforts, occasioned by the accelerating threat to human health and welfare and Congressional dissatisfaction with previous efforts to control this threat. For 15 years, through four separate pieces of legislation, Congress sought to solve this public health problem by granting federal and state administrators wide discretion. By 1970 it was clear that these attempts had failed. The air pollution problem was worsening at an increasing rate. Thus the 1970 Amendments reflect deep Congressional impatience with the long history of inaction by both State and federal bureaucra-

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<sup>6</sup> U.S. Council on Environmental Quality, *Environmental Quality: The Fourth Annual Report of the Council on Environmental Quality* 78 (1973).

<sup>7</sup> U.S. Environmental Protection Agency, *The Cost of Clean Air: Annual Report of the Administrator of the Environmental Protection Agency to the Congress of the United States* 1-4 (1974).

cies, and are intended to restrict substantially the range of administrative discretion and State authority.

Prior to 1970, the federal air pollution legislation was a near textbook model of federalism. The first major federal act dealing with the problem was the Act of July 14, 1955, 69 Stat. 322 ("1955 Act"). This Act was an invitation to the States to act: it set out the problem and promised federal support, but specifically gave responsibility for standard-setting and enforcement to the States.

After eight years of State inaction, Congress passed the Clean Air Act of 1963, 77 Stat. 392 (1963) ("1963 Act"). The legislature recognized that since 1955 there had been accelerating growth in the air pollution problem. 1963 Act § 1(a), 77 Stat. 392, 42 U.S.C. § 1857 (a). In light of the deteriorating situation, Congress gave the federal government its first, greatly limited, enforcement power, a complex and unwieldy "conference" procedure for interstate pollution problems, which could, with sufficient perseverance, lead to court action. 77 Stat. 396, presently 42 U.S.C. § 1857(d), as amended. Two years later, Congress increased slightly the power of the federal government to take action to abate pollution, giving the federal authorities the authority to begin the conference and hearing process without receiving a formal request from the States. Amendments to the Clean Air Act, 79 Stat. 996 (1965).

By 1966 only 26 States had established legislative controls over air pollution. Many of those States' statutes were riddled with variance provisions that undermined effective action to clean the air. U.S. Depart. of Health, Education, and Welfare, "A Digest of State Air Pollution Laws." Public Health Service Pub. 711, at ii (1966).

As a result of continuing State failure to act, Congress once again increased the federal responsibility for controlling air pollution by passing the Air Quality Act of

1967, 81 Stat. 485 (1967) ("1967 Act"). Federal authorities were to designate "Air Quality Control Regions" and to publish air quality "criteria"—compilations of the results of scientific studies of the effects of various pollutants on human health and welfare. 81 Stat. 490.

The 1967 Act still provided State and federal administrators wide discretion. For example, the federal government was given eighteen months merely to designate the boundaries of Air Quality Control Regions ("AQCR's") and asked to compile the air quality "criteria" documents only as soon as practicable. 81 Stat. 490. But the National Air Pollution Control Administration ("NAPCA") failed to carry out even these first minimal steps towards air pollution control with the anticipated dispatch. By the end of 1969 criteria documents had appeared for only two of the six most prevalent pollutants. After nearly three years, NAPCA reported to Congress in 1970 that it had managed to designate only twenty-five Air Quality Control Regions. Only 12 enforcement actions were ever undertaken during the three years of the Act's life.

As the continued failure of federal and State administrators to act became manifest, the United States Congress addressed itself again, for the fifth time in

\* The criteria document for sulfur oxides first appeared in 1968, and was reissued in 1970, U.S. Dept. of Health, Education, and Welfare, Public Health Service AP-50; the one for particulate matter was issued in January of 1969, as AP-49. During the hearings on the 1970 Amendments, Senator Randolph remarked acidly on the fact that publication of three additional criteria documents occurred only when Congress convened hearings. Hearings on S. 3229, S. 3466, 3546 before the U.S. Sen. Comm. on Public Works, Subcomm. on Air and Water Pollution, 91st Cong., 2d Sess. 126 (1970) [Hereinafter, "Sen. Clean Air Amendments Hearings"].

<sup>10</sup> *Id.* By contrast, under the 1970 Act AQCR's were to be designated within 90 days, § 107(c), 42 U.S.C. § 1857c-2(c). As a result the total number of AQCR's rose in three months to 247.

<sup>11</sup> BNA Environment Reporter, Federal Laws 41:1201-65.



15 years, to the goal of protecting public health and welfare from the effects of air pollution. The Clean Air Act Amendments of 1970, 42 U.S.C. 1857 *et seq.*

Rejecting Administration<sup>11</sup> and House<sup>12</sup> bills that would have largely perpetuated the tradition of granting wide discretion to State and federal administrators, the Congress chose in 1970 to limit the discretion that had undermined previous efforts to abate pollution. Unlike previous legislation, the 1970 Amendments are studded with explicit deadlines for action<sup>13</sup> and specifically articulated standards for decisions.<sup>14</sup> If the States fail to act as required, EPA must step in with federal regulations.<sup>15</sup> If inaction continues, EPA is directed to take over State pollution control programs and to use its greatly increased enforcement powers.<sup>16</sup> In case either EPA or a State government fails to discharge its duties,

<sup>11</sup> S. 3466, printed in Sen. Clean Air Amendments Hearings, *supra* 26 *et seq.*

<sup>12</sup> H.R. 17255. H Rep. No. 91-1146, 91st Cong., 2d Sess. 26 *et seq.* (1970).

<sup>13</sup> See, e.g., § 108(a)(1) and (2), 42 U.S.C. § 1857c-3(a)(1) and (2); § 109(a)(1) and (2), 42 U.S.C. § 1857c-4(a)(1) and (2); § 110(a)(1), (a)(2), (c)(1)(C), 42 U.S.C. § 1857c-5(a)(1), (a)(2), (c)(1)(C), § 111(b)(1)(A) and (B), § 1857c-6(b)(1)(A) and (B); § 112(b)(1)(A) and (B), 42 U.S.C. § 1857c-7(b)(1)(A) and (B); § 113(a)(2), 42 U.S.C. § 1857c-8(a)(2); § 202(b)(1), (2) and (4), 42 U.S.C. § 1857f-1(b)(1), (2) and (4); § 212(d)(3)(F), 42 U.S.C. § 1857f-6(e)(d)(3)(F); § 231(a)(1) and (2), 42 U.S.C. § 1857f-9(a)(1) and (2); § 313, 42 U.S.C. § 1857j-2.

<sup>14</sup> See, e.g., § 108(a), 42 U.S.C. § 1857c-3(a); § 109(b), 42 U.S.C. § 1857c-4(b); § 110(a)(2), (a)(3), (c), (e) and (f); 42 U.S.C. § 1857c-5(a)(2), (a)(3), (c), (e) and (f); § 111(a)(1), 42 U.S.C. § 1857c-6(a)(1); § 112(a)(1), 42 U.S.C. § 1857c-7(a)(1); § 113(a)(1), (2) and (3), 42 U.S.C. § 1857c-8(a)(1), (2) and (3); § 202(a) and (b), 42 U.S.C. § 1857f-1(a) and (b); § 207(c), 42 U.S.C. § 1857f-5a(c); § 211(c), 42 U.S.C. § 1857f-6(c); § 212(a)(4), 42 U.S.C. § 1857f-6(a)(4); and § 231(a), 42 U.S.C. § 1857f-9(a).

<sup>15</sup> § 110(c), 42 U.S.C. § 1857c-5(c).

<sup>16</sup> § 113, 42 U.S.C. § 1857c-8.

the Act gives citizens the right to sue for injunctive relief in federal court.<sup>17</sup>

### C. The Regulatory Scheme.

In drafting the Clean Air Amendments, Congress drew upon its 15 years of experience to fashion a regulatory scheme designed to prevent the administrative backsliding that had gone before, and tailored to the special regulatory problems posed by the physical nature of the air pollution problem.

The vehicle for the attainment of air quality protecting public health and welfare is the State Implementation Plan. § 110(a)(2), 42 U.S.C. § 1857c-5(a)(2). The purpose of this document is to describe the measures needed to curtail air pollution, and to force the State to bind itself to take these measures.

The statute requires the Environmental Protection Agency to promulgate regulations establishing National Primary and Secondary Ambient Air Quality Standards, indicating concentrations of pollutants in the general outdoor ("ambient") air just below those that have been demonstrated to have adverse effects on people (Primary Standards) and the remainder of the environment (Secondary Standards). § 109, 42 U.S.C. § 1857c-4. These levels are assumed, for purposes of the law, to constitute threshold concentrations below which damage does not occur.<sup>18</sup>

<sup>17</sup> § 304, 42 U.S.C. § 1857h-5.

<sup>18</sup> The assumption that such thresholds exist must be seen as a matter of regulatory convenience, rather than scientific fact. Congress was informed, even as it considered the Clean Air Amendments, that the scientific community doubted the assumption, believing it more likely that air pollutants caused injury to public health at any concentration in the ambient air. Dr. Middleton, then head of the National Air Pollution Control Administration (EPA's predecessor with respect to air pollution control), for example, told the Senate Subcommittee members that in his opinion

One of the crucial innovations of the Amendments is the requirement that the States commit themselves, in their State Implementation Plans, to a stated deadline for the attainment of each type of Standard. In the case of Primary Standards, protecting public health, the State must attain the Standard "as expeditiously as practicable," but in any case no more than three years from the federal approval of its Plan.<sup>19</sup> In the case of

the thresholds then under consideration were probably artifacts of our present scientific knowledge:

We know from the criteria published for sulfur oxides, that at certain levels definite adverse effects occur in the lung. We also know that at a little lower level there are more subtle effects on the action of the lung, and that below that some enzyme system begins to fail or to function improperly. The no-effect level would have to be somewhere below that, but as science progresses, it is very likely that we are going to find still other body chemical systems that are being affected, so the no-effect level always corresponds, you might say, to the limitations of scientific knowledge in this area. [emphasis supplied.]

Sen. Clean Air Amendments Hearings, *supra*, 1490.

This is one reason why some States considered it prudent to seek to attain air cleaner than the National Standards, and why both Congress and EPA encouraged this quest. § 116, 42 U.S.C. § 1857d-1, and 40 C.F.R. § 51.13(d).

<sup>19</sup> The history of this requirement indicates that it was increasingly tightened as the bill progressed through the Congress. The Administration's original bill would have required the attainment of Standards only within "a reasonable time." S. 3466, § 7(a), printed at Sen. Clean Air Amendments Hearings, *supra*, 37. The original bill proposed in the Senate Subcommittee on Air and Water Pollution contained identical language, as did the House bill. S. 3546, § 4, which would have amended § 108(c) of the 1967 Air Quality Act, printed at *Id.*, 49; H.R. 17255, § 108(c)(1)(C)(i), printed at H.R. Rep. No. 91-1146 26 (1970).

The bill finally passed by the Senate was stricter, but still less stringent than the Act itself. It would have required the attainment of the Standards "within three years" of the date of the approval of the State Plan. S. 4358, § 111(a)(2)(A), printed in S. Rep. No. 91-1196, 91st Cong., 2d Sess. 68, 87 (1970).

[Footnote continued on page 11]

Secondary Standards, the State must specify in its Plan a "reasonable time" for attainment. § 110(a)(2)(A), 42 U.S.C. § 1857c-5(a)(2)(A).

Experience with previous federal legislation demonstrated forcefully, however, that *ambient air quality* standards were not sufficient alone to regulate sources of pollution.<sup>20</sup> Because the air is continuously moving, mixing pollutants emitted from sources over very large areas,<sup>21</sup> it is impossible except under very rare circumstances to relate the air quality at any given spot to the emissions from any given polluter with sufficient certainty to satisfy the court-room standards of proof. For this reason, the Clean Air Amendments also require each State to adopt enforceable *emission limitations*, for each general category of source, specifying quantities of pollutants that may be released at the smokestack.<sup>22</sup> These

<sup>19</sup> [Continued]

The Conference Committee further tightened these deadlines, and the Amendments as passed require each State to choose a deadline for attainment that is "as expeditious as practicable but (subject to subsection (e)) in no case later than three years from the date of approval." § 110(a)(2)(A), 42 U.S.C. § 1857c-5(a)(2)(A).

<sup>20</sup> This point was made virtually from the time of passage of the Air Quality Act of 1967, which required the States to adopt only ambient air quality standards. See, e.g., John E. O'Fallon, *Deficiencies in the Air Quality Act of 1967*, 33 LAW AND CONTEMPORARY PROBLEMS 275 (1968). For a recent discussion of this point, see Richard E. Ayres, *Enforcement of Air Pollution Controls on Stationary Sources Under the Clean Air Amendments of 1970*, (forthcoming) 4 ENVIRONMENTAL LAW QUARTERLY—(Fall, 1974).

<sup>21</sup> Rall, David P., *A Review of the Health Effects of Sulfur Oxides*, National Institute of Environmental Health Services, N.I.H., Research Triangle Park, North Carolina 22 (1973). Also, U.S. Environmental Protection Agency, National Environmental Research Center, *Summary Report on Suspended Sulfates and Sulfuric Acid Aerosols*, Research Triangle Park North Carolina p. a-b, (1973).

<sup>22</sup> The Report of the Senate Committee made this point very clearly:

Because attainment of ambient air quality is possible only through the enforcement of precise and objective emission

emission limitations are the tools for attaining the goal of healthful air quality.<sup>23</sup> To determine what emission limitations would be necessary, the States first calculated the degree to which the National Ambient Air Quality Standards were being exceeded in each of the natural airsheds within their territory.<sup>24</sup> On the basis of these calculations, each State then adopted uniform emission limitations for various relatively homogeneous classes of polluting sources throughout each airshed, or throughout

controls the Committee bill would delete the enforcement requirement for the abatement of violations of the air quality standard. The precise and objective emission controls "subject to enforcement" would include but not be limited to emission requirements, emission standards, standards of performance, prohibitions of emissions, schedules and timetables of compliance and other requirements for recordkeeping and the installation of monitoring equipment.

S. Rep. No. 91-1196, 91st Cong., 2d Sess. 21 (1970). *See also, Id.*, 12, and testimony of Terry L. Stumph and Robert L. Duprey, of the National Air Pollution Control Administration, before the Senate Subcomm. on Air and Water Pollution, Sen. Clean Air Amendments Hearings, *supra*, 397 (1970).

The Congressional intent to use emission limitations as the regulatory basis of the 1970 Amendments was also discussed at length in the 1972 Senate Oversight Hearings on the Act. *See* Hearings, "Implementation of the Clean Air Amendments of 1970," before the Senate Comm. on Public Works, Subcomm. on Air and Water Pollution, 92nd Cong., 2d Sess. 180, 207-209, 244, 268-271 (1972).

Emission limitations may take various forms, depending on the kind of industry being regulated and the most efficacious methods for reducing its effluent. Some emission limitations prescribe the quantity or weight of pollutants per pound of material processed that may be emitted from a factory's smokestack, leaving entirely up to the industry the technique to be used to comply with the limitation. Some specify the allowable pollutant concentration in the fuel used. Others, in industries such as steel manufacturing, specify that a particular process or procedure be used in order to reduce emissions.

The 1967 Air Quality Act first required the States to designate the natural airsheds within their boundaries for the purposes of air pollution control. These areas are known as Air Quality Control Regions ("AQCR"). § 107, 42 U.S.C. § 1857c-2.

the State as a whole. These easily enforceable emission limitations, rather than the ambient air quality standards, establish the actual degree of control that each source of pollution must undertake.

Some regulated sources were, of course, already closer to meeting the emission limitations that applied to them than others at the time the State Implementation Plans were adopted. In order to provide the flexibility needed to take account of these differing circumstances, the Act required States to negotiate individual compliance schedules for meeting the general emission limitations for each pollution source. § 110(a)(2)(B), 42 U.S.C. § 1857c-5(a)(2)(B). Compliance schedules extending over more than 12 months included enforceable "increments of progress," in order to assure that the source does not fall behind in taking the required control actions. 40 C.F.R. § 51.15(c). App. 9.

If an individual source fails to meet the negotiated timetable, the regulatory agency must decide whether to authorize additional time for compliance or subject the source to jeopardy of enforcement action. This case presents the question of which level of government Congress intended to make this decision, and what criteria are to be used to decide whether a source shall be given additional time, even after it has failed to meet a previously agreed-upon compliance schedule. Under the State laws that governed prior to the Clean Air Amendments, a source owner could seek a delay by applying for a "variance" from the State pollution control agency. If (usually after a public hearing) the State agency determined that the polluter had met vaguely specified standards of hardship,<sup>25</sup> it could grant a variance pre-

<sup>25</sup> The Georgia statute that was the object of the court's decision below, GA. CODE ANN. § 88-912, is a catalogue of the kinds of hardship considerations in most State statutes. It is reprinted at the end on this brief, *infra* at 51.

venting the State (or any other party) from suing for enforcement of the original timetable.

At issue in this case is one of the key provisions of the Act, which embodies Congress' decision to limit the discretion of federal and State administrators to grant such sources additional time for compliance. § 110(f), 42 U.S.C. § 1857c-5(f). As noted previously one of the major weaknesses in the State air pollution control programs that had grown up under the earlier clean air statutes was the broad discretion given State administrators to grant variances to escape clean-up deadlines. The Georgia variance statute, with its broad and vague standards, poorly articulated procedures, and low visibility administrative discretion, is an archetype of these laws. It was obvious that the deadlines and other carefully drawn requirements of the 1970 Amendments would be threatened if administrators were allowed to continue exercising this vast discretion. Congress thus explicitly pre-empted such State variance laws with the federal postponement procedure of § 110(f), which sets up a highly visible procedure for reaching a decision and specifies clear standards for deciding whether more time is warranted. This procedure is the linch-pin of the entire federal scheme. For the protection of public health and welfare, and the vindication of Congressional intent, it must be upheld as written.

Under § 110(f), an individual polluter must demonstrate, in a federal administrative adjudicatory proceeding, that he meets four specific requirements in order to obtain a one year "postponement" of his timetable for compliance:

- (A) that he has made good faith efforts to comply with the Plan's requirement;
- (B) that the necessary technology or other methods of control are not available or have not been

available for a sufficient period of time to enable compliance;

- (C) that he has implemented the available alternative operating procedures or other interim control measures to minimize the impact of continued noncompliance on public health;
- (D) that continued operation of the sources is essential to national security or public health and welfare.

§ 110(f)(1)(A)-(D), 42 U.S.C. § 1857c-5(f)(1)(A)-(D).

Keeping in mind that Congress did not intend to sanction granting individual polluters additional compliance time willy-nilly, the requirements for obtaining a postponement are neither burdensome nor unreasonable. A polluter who asks for additional time for compliance is asking the government to sanction emissions that will damage the health and welfare of its people—emissions which he had earlier agreed to abate. In such a situation, it does not seem unreasonable to require the polluter to show that his inability to comply on time is the result of real impossibility, despite good faith efforts; that he is applying all the alternative interim measures he can to reduce the damage to health until he can comply; and that the operation of his source of pollution has a social value that justifies the additional social harm he seeks to inflict. When one considers the Congressional purpose in enacting the Clean Air Amendments, it seems hardly untoward to burden those who would endanger public health with the duty to justify their request.

All parties before the Court agree that this federal procedure pre-empts State variance laws. The disagreement has to do with what circumstances trigger pre-emption. Respondents, in concert with the court below and three of the other four Courts of Appeal that have considered the issue, maintain that pre-emption is trig-



gered as of a date certain. The Fifth Circuit, tracking the clear and unequivocal language of the statute, held that once the EPA Administrator approved a State's Implementation Plan, the State's variance law was pre-empted. *Natural Resources Defense Council, et al., v. Environmental Protection Agency*, 489 F.2d 390, 398-403 (5th Cir. 1974). The First Circuit agreed, but, seeking to allow EPA and the States somewhat more flexibility, stretched the statute's language to hold that pre-emption occurred only as of the date chosen by the State for attainment of the National Primary Ambient Air Quality Standards. *Natural Resources Defense Council, et al., v. Environmental Protection Agency*, 478 F.2d 875, 884-888 (1st Cir. 1973). Two other Courts of Appeals, those for the Eighth and Second Circuits, followed the First Circuit. *Natural Resources Defense Council, et al., v. Environmental Protection Agency*, 483 F.2d 690, 693-694 (8th Cir. 1973), and *Natural Resources Defense Council, et al., v. Environmental Protection Agency*, 494 F.2d 519, 523 (2d Cir. 1974). The practical effect of these four decisions becomes increasingly similar as the States' attainment dates approach.<sup>26</sup>

EPA acceded to this interpretation in regulations published September 26, 1974 (after the filing of its petition for certiorari with this Court), which disapproved the variance statutes of all the States. 39 Fed. Reg. 34533-37, 34572-74 (Sept. 26, 1974), App. 11-27. In its brief here, however, the Agency has taken a radically different position, claiming that pre-emption is triggered only upon its own finding that a State variance will result in air quality worse than a National Air Quality

<sup>26</sup> Thirty-two of the States chose July, 1975, or earlier, as the date for attaining the National Standards for the pollutants most associated with the stationary sources that could be expected to request variances or postponements. The remaining 18 received extensions of the attainment date under § 110(e), 42 U.S.C. § 1857e-5(e), up to two years.

Standard. This represents a return to its earlier position, which was rejected explicitly by four of the five Courts of Appeal.

This approach was also considered, and rejected, by Congress, when it wrote the Clean Air Amendments, as part of the general Congressional decision to avoid the use of ambient air quality standards to regulate individual pollution sources which has been discussed previously. It would have the effect of undermining the uniform national regulatory system that Congress sought in passing the Amendments, thus setting back seriously the nation's effort to restore the air to breathable quality. And it is flatly inconsistent with the plain words of the statute itself. For these reasons, this Court should reject EPA's newest attempt to return to its discredited earlier interpretation, and order the Agency to adhere to the scheme adopted by Congress.

#### SUMMARY OF ARGUMENT

The question in this case is the proper interpretation of § 110(f), the federal postponement procedure of the Clean Air Amendments of 1970. Section 110(f) provides a federal procedure for determining whether an individual source of pollution may be granted additional time to meet previously agreed-upon compliance schedules for curtailing its emissions into the air. Respondents, in concert with the court below, take the position that once the initial regulatory actions were taken under the Amendments, the federal procedure pre-empted lax State variance laws. EPA, on the other hand, urges that the federal procedure pre-empts only after its own decision that the requested variance would prevent the attainment or maintenance of a National Ambient Air Quality Standard—a decision which it has admitted, in other contexts, is subject to as much as 100 per cent error.

Section 110(f) is not ambiguous, and it provides no room for the interpretation EPA is attempting to give it. The section provides that a federal proceeding before EPA shall be convened whenever "*any* stationary source" seeks additional time "to comply with *any* requirement of an applicable implementation plan" [emphasis supplied]. Congress chose this language from among several alternatives that would have allowed the States to continue granting variances. The legislature chose to adopt a uniform federal system, with clear procedures and standards for decision, in order to prevent the administrative backsliding and playing off of one State against another that had hobbled earlier clean air legislation.

The statute provides that an approved Implementation Plan may be altered through a "revision," § 110(a)(2)(H), (a)(3), 42 U.S.C. § 1857c-5(a)(2)(H), (a)(3), and EPA has sought to justify its approval of State variance laws under its revision authority. This simply cannot be squared with the statute. A revision (the word is used six times consistently in § 110) is a device initiated by EPA for making general changes in an entire Implementation Plan if, for example, EPA promulgates a new National Ambient Air Quality Standard. A postponement, on the other hand, is a procedure invoked by the source-owner (through his Governor) to alter a specific portion of a State Plan as it applies to that source.

Five Courts of Appeal have reviewed the question presented here. All five held that EPA may not claim power from the revision authority of the statute to allow States to grant variances. Four, including the Court below, agreed with respondents that the federal postponement provision pre-empts State variance laws as of a time certain, rejecting EPA's argument that pre-emption is triggered by a judgment about air quality. The court below held that pre-emption occurred when State Plans were approved, while the First Circuit, fol-

lowed by the Second and Eighth, held that pre-emption occurred only in the "post-attainment" period—the period after the date chosen by the State for attainment of the National Primary Standards. For practical purposes, these four decisions are becoming increasingly indistinguishable, since in most States the attainment date, at least for Primary Standards, is mid-1975.

EPA's own regulations even belie its present position. EPA has repeatedly stated that it does not believe ambient air quality measurements or estimates are appropriate to make regulatory decisions for individual sources. Recently, the Agency applied this to variances, promulgating regulations that explicitly pre-empt all state variance statutes in the post-attainment period. These regulations abandon any attempt to use air quality to determine when State variance laws are pre-empted, or to claim authority for this attempt from the revision authority of the Act.

These regulations purport to adopt the First Circuit's holding. Much as they undermine EPA's position, they do not meet the requirements of the Act. The legislative history of the Act shows that Congress considered pre-empting State variance laws only in the "post-attainment" period, but decided, as part of a general tightening of key parts of the bill, that the postponement provision should apply whenever "any source" seeks more time to comply with "any requirement" of a State Plan.

Interpreting the postponement provision as it is written is crucial to the attainment of the Congressional purpose. If EPA may determine when § 110(f) applies by ad-hoc air quality judgments (which it admits may be quite inaccurate), then the whole structure of the Act collapses. Unable to determine with precision when a source is violating air quality standards, the States and EPA will be easy prey to political pressure and hardship arguments on a case-by-case basis. In the end, emissions will

continue to rise, the National Standards will not be attained, and we can expect the serious health consequences outlined previously, *supra* 2-5.

The postponement provision will not be more burdensome to administer than EPA's proposal. Far from simplifying matters, EPA's variance revision scheme would involve two agencies rather than one and inject several new issues into the decision whether to grant more time—some such as air quality, extremely difficult and costly to determine. The revision process is anything but expeditious. In the past, EPA has often taken a year or more to approve a revision. On the other hand, if the postponement provision operates as Congress expected, it will deter some sources from seeking additional time, reducing the Agency's burden while encouraging compliance.

Nor is it necessary to sanction EPA's misreading of the statute because of State reliance on EPA's interpretation. EPA has suggested that it allowed variances to entice the States into choosing early dates for the expiration of compliance schedules and attainment of Standards. If this is true, there was no need for it. The States were required to choose the earliest date practicable for attaining the Standards, and EPA had a duty to disapprove any Plans that did not. As a matter of fact, early dates were not chosen. Only three of the States where the Primary Standards were violated chose attainment dates earlier than the statutory maximum time period. And many individual compliance schedules are still being negotiated, nearly three years after they were to have been submitted under the statute. Thus reliance, though a theoretical possibility, has not in fact occurred.

The supposed reliance problem EPA cites arises from the fact that EPA did not correct the failure in some State laws to distinguish between compliance schedules negotiated when the Plan was being adopted, and later

requests for additional time. This could have been done at the time the State Plans were submitted, and under EPA's own regulations, should have been. Instead, the Agency chose to ignore its own clarifying regulation in the hope that it could use the ensuing confusion as a lever to coerce the courts into its view of the postponement procedure. This attempt should be rejected, and appropriate action ordered.

## ARGUMENT

### I. THE CLEAN AIR AMENDMENTS PRE-EMPT THE STATES FROM ISSUING VARIANCES TO THE TIMETABLES OF COMPLIANCE, EMISSION LIMITATIONS, AND OTHER REQUIREMENTS OF STATE IMPLEMENTATION PLANS.

#### A. This Conclusion Is Compelled By The Language And Structure Of The Act, And Its Legislative History.

This case presents a straight-forward question of statutory interpretation: whether § 110(f) of the Clean Air Amendments is the exclusive mechanism for a polluting source to request more time to comply with the timetables of compliance for meeting the emission limitations and other requirements of its State Implementation Plan. As always, the words of the statute itself provide the first and authoritative indication of the intent of the legislature. In this case, these words are surpassingly clear:

Prior to the date on which *any stationary source (or class of moving sources)* is required to comply with *any requirement of an applicable implementation plan* the Governor of the State to which the plan applies may apply to the Administrator to postpone the applicability of such requirement to such

source (or class) for not more than one year.  
[emphasis supplied]

42 U.S.C. § 1857c-5(f)(1).

These words are stark and unequivocal—a request for additional time from *any* individual pollution source to comply with *any* requirement must be made through the postponement procedure. There is not the slightest suggestion in these words that the application of this procedure is limited either in time or circumstance. Once a State Plan becomes “applicable”—that is, once it has been approved by the Administrator<sup>22</sup>—an individual pollution source may not obtain an alteration in its timetable for compliance save through a postponement proceeding.<sup>23</sup>

Congress chose this language from among several alternatives. The Administration favored continued State control over deadlines,<sup>24</sup> which would have perpetuated the lax State variance statutes. So did the original House bill.<sup>25</sup> But Congress rejected these proposals resound-

<sup>22</sup> See § 110(a) and (c), 42 U.S.C., § 1857c-5(a) and (c).

<sup>23</sup> Of course, the source may actually take more time to comply, even if it does not seek or fails to obtain a postponement, but only at the risk of enforcement action. As a practical matter, sources that are exerting good faith efforts may have little to fear from enforcement actions, even if they do not qualify for a postponement, since the federal and State agencies may have far fewer resources than they need to enforce fully the Act's requirements, and therefore may choose to act against willful violations first.

But the possibility that enforcement action could be taken will tend to encourage source-owners to achieve compliance as rapidly as possible.

<sup>24</sup> See Sen. Clean Air Amendments Hearings, *supra* at 1501-02, and note 19, *supra*.

<sup>25</sup> See note 19, *supra*.

ingly,<sup>31</sup> opting instead for a bill that required any request from a specific source to defer the requirements of an Implementation Plan applicable to it to go through the federal postponement procedure. Senator Eagleton, a prominent draftsman of the 1970 Act, explained why:

... I don't want [the public] to think we passed a clean air act that has variances depending upon the reasonable rate of implementation which goes on endlessly.<sup>32</sup>

A strict construction of the Act's language is also the only interpretation consistent with its structure and purposes as a whole, as the court below correctly noted:

In a statute that constituted a "challenge to do what seem[ed] impossible," seeking to "forc[e] technology to catch up with the newly promulgated standards," it was essential to include a device to ensure that ambitious commitments made at the planning stage could not readily be abandoned when the time came to meet those commitments, and to assume the costs and burdens they entailed.

Section 1857e-5(f) is the device Congress chose to assure this. Congress aimed to make "variances," "postponements," or whatever departures from earlier commitments might be called unusual and difficult to obtain.

*Natural Resources Defense Council, et al. v. Environmental Protection Agency*, 389 F.2d 390, 401-402 (5th Cir. 1974). If variances were easy to obtain, the deadlines for attaining healthful air quality, which were perhaps the most innovative aspect of the 1970 Act,

<sup>31</sup> For example, the Senate bill, which largely became the Act, passed by a margin of 73-0. 116 Cong. Rec. S33120 (daily ed., Sept. 22, 1970).

<sup>32</sup> Sen. Clean Air Amendments Hearings, *supra*, at 1502.



would become meaningless. Under the Act, each State must specify a deadline in its Plan that represents the most expeditious practicable date for attainment of the Standards. In order to reach this goal, the State relies on each regulated source to meet its timetable for compliance with the emission limitations. If, because of lenient State variance laws, the State agencies are forced to grant sources additional time, the attainment of the statutory goal will be frustrated.

What is more, the national uniformity in pollution control laws that Congress sought would be wrecked. One of the greatest reasons for the failure of the 1967 Air Quality Act to improve the air pollution problem was that by leaving to the States the setting of standards, emission limitations, and deadlines, it left them subject to whipsawing by recalcitrant industries. Polluters could often prevent the adoption of strong State regulations by threatening to move their facilities to jurisdictions with more lenient laws. This unhappy experience comprised part of the Congressional motivation for requiring uniform National Air Quality Standards and limiting the maximum time that could be taken to meet the Standards.<sup>33</sup> Understanding these facts from past experience, Congress concluded, after considering other mechanisms, that it must enact a tougher uniform federal variance procedure to replace the State laws, and it did.

EPA suggests, *inter alia*, that the existence of the "revision" authority provided by § 110(a)(2)(H) and (a)

The political pressure that can be applied to prevent any State from exceeding the minimum federal requirements has been graphically illustrated once again in the States' choice of their deadlines for attaining the National Standards. Despite the Act's injunction to choose the earliest practicable attainment date, only three of the States where Primary Standards were violated picked a date earlier than the statutory maximum of three years from the date of EPA's approval of the Plan. See note 55, *infra*.

(3) shows Congress did not intend that all changes in compliance schedules and other individually applicable requirements be made through the postponement procedure. EPA's Brief 21. This claim, as the court below and all of the other Courts of Appeal that have reviewed the issue have agreed,<sup>4</sup> reflects a serious confusion of the carefully distinguished purposes and applicability of the revision and postponement provisions, the only two means of changing an Implementation Plan, once approved,<sup>5</sup> provided by the statute. Both words—"postponement" and "revision"—are carefully used words of art. The distinction between them is akin to that between a general revision of a zoning ordinance and a zoning variance. The revision section requires State Implementation Plans to include a procedure for revision under three circumstances:

- (i) from time to time as may be necessary to take account of revisions of such national primary or secondary ambient air quality standard or the availability of improved or more expeditious methods of achieving such primary or secondary standard; or
- (ii) whenever the Administrator finds on the basis of information available to him that the plan is substantially inadequate to achieve the national ambient air quality primary or secondary standard which it implements.

The *revision* procedure is a device initiated by an EPA finding or action for making *general* changes in the en-

<sup>4</sup> See *infra*, at 28-30.

<sup>5</sup> Prior to the Administrator's approval, a State may request an "extension," which may extend the maximum time allowable for the attainment of a National Primary Standard to as much as five years. § 110(c), 42 U.S.C. § 1857c-5(c). An extension must be requested by the Governor of the State, and the State must show that (1) using all available means of controlling pollution, it will be impossible to meet the Standard; and (2) all reasonably available means of control will be applied in the interim in order to minimize the danger to public health. See *NRDC, et al., v. EPA*, 475 F.2d 968 (D.C.Cir. 1973).

ture Plan. Section 110(a)(2)(H), 42 U.S.C. § 1857c-5(a)(2)(H). The *postponement* procedure, on the other hand, is initiated by an *individual source* (through his State Governor) to alter a *specific* compliance schedule, emission limitation, or other element of the Plan *as it applies to him*. Both apply from the date the State Plan is approved, but to different situations.

The word "revision" is used consistently some six times throughout § 110 of the Act to indicate a procedure for changing large portions of a State Plan upon specified findings by EPA. The primary indications of Congressional intent are § 110(a)(2)(H) and (a)(3), 42 U.S.C. § 1857c-5(a)(2)(H) and (a)(3). But the word is also used in four other places in contexts that reinforce the interpretation given here. § 110(a)(1), 42 U.S.C. § 1857c-5(a)(1); § 110(a)(2)(A)(i), 42 U.S.C. § 1857c-5(a)(2)(A)(i); § 110(c)(1)(C), 42 U.S.C. § 1857c-5(1)(C); and § 110(d), 42 U.S.C. § 1857c-5(d). Significantly, "revision" does not appear in either the postponement section or in the section that imposes a duty on the States to adopt emission limitations and compliance schedules. § 110(a)(2)(B), 42 U.S.C. § 1857c-5(a)(2)(B). Nor is it ever referred to in any way in connection with these sections.

Unlike the postponement procedure, which is initiated by the source-owner (through his Governor), the revision procedure is initiated by an action of EPA. § 110(a)(2)(H), 42 U.S.C. § 1857c-5(a)(2)(H). And unlike the postponements, whose purpose is to delay abatement, the purpose of revisions is to restructure State Plans to accelerate abatement or attain it in greater concert with other national goals. *Id.* The revision section requires States to provide for revising their Plans in four specified situations: (1) if the Administrator promulgates new National Air Quality Standards; (2) if new or more expeditious methods of controlling pollution become available, allowing the State to attain the existing National

Standards more quickly;<sup>36</sup> (3) if the Administrator finds, contrary to his earlier judgment in approving the Plan, that it is substantially inadequate to achieve the existing National Standards within the State's chosen deadlines; or (4) if the Administrator finds that the State's general emission limitations can be revised to conserve oil without preventing attainment or maintenance of the National Standards.<sup>37</sup>

Each of these eventualities would substantially alter the underlying basis for the entire State Plan. For example, if the Administrator were to promulgate a new National Primary Standard of 50 micrograms per cubic meter for sulfur oxides, replacing the present 80 microgram Primary Standard, each State's entire control strategy for meeting the Primary Sulfur Oxides Standard would have to be changed. A State that could meet the 80 microgram Standard by reducing the sulfur oxide emissions by 20 percent might now have to reduce them by 50 percent to meet the new Standard. In effect, such a change would require a substantially new Plan, setting new emission limitations, controlling sources which previously could have been left uncontrolled, and perhaps

<sup>36</sup> Though the statute does not state that this judgment shall be reached by the Administrator, the structure of the Act suggests that such a finding would probably be made nationally. See, e.g., §§ 111 and 112, 42 U.S.C. §§ 1857c-6 and 1857c-7. EPA's superior research and evaluation resources, which far exceed those of any of the States, also virtually assure that EPA will make such judgments.

<sup>37</sup> The Energy Supply and Environmental Coordination Act of 1974, Pub. L. No. 93-319, 88 Stat. 256 (1974), added this section directing EPA to conduct a study and to notify the State if it finds that the State's general emission limitations can be revised to conserve oil without preventing attainment or maintenance of the National Standards. § 110(a)(3)(B), added by the Energy Supply and Environmental Coordination Act of 1974. But, consistent with Congress' earlier decision, based on its doubts that the National Ambient Air Quality Standards would fully protect public health, see note 18 *supra*, to encourage States to adopt more protective Plans, did not require the States to revise their Plans on the basis of EPA's notification.

instituting other additional types of controls contemplated by the Act. See § 110(a)(2)(B), 42 U.S.C. § 1857c-5(a)(2)(B). For this reason, the Act provides for EPA review parallel to that for the original Plan. §§ 110(a)(3) and 110(c)(1)(C), respectively; 42 U.S.C. §§ 1857c-5(a)(3) and 1857c-5(c)(1)(C). As with the original Plan, the Administrator may approve a Plan revision only if (1) it has been subjected to public hearing, and (2) it meets the general requirements for an Implementation Plan set out in "paragraph 110(a)(2)." Section 110(a)(3), 42 U.S.C. § 1857c-5(a)(3).

**B. EPA's Proposed Reading Of The Statute Has Been Rejected By The Courts Of Appeal That Have Reviewed The Issue.**

Five Courts of Appeal have reviewed the issue presented here. *Natural Resources Defense Council, et al., v. Environmental Protection Agency*, 489 F.2d 390 (5th Cir. 1974) (the court below), *Natural Resources Defense Council, et al., v. Environmental Protection Agency*, 478 F.2d 875 (1st Cir. 1973), *Natural Resources Defense Council, et al., v. Environmental Protection Agency*, 494 F.2d 519 (2d Cir. 1974), *Natural Resources Defense Council, et al., v. Environmental Protection Agency*, 483 F.2d 690 (8th Cir. 1974), and *Natural Resources Defense Council, et al., v. Environmental Protection Agency*, No. 72-2145, — F.2d — (9th Cir. Nov. 11, 1974). All five rejected EPA's interpretation of the Act's revision sections. All but one also rejected EPA's claim that pre-emption of State variance laws depended on EPA's determination of whether the requested variance would prevent attainment or maintenance of a National Ambient Air Quality Standard, holding this legally irrelevant to the question of when § 110(f) pre-empted State variance laws.

The opinion of the Fifth Circuit, the court below, is the most consistent and carefully reasoned. Canvassing the

history and regulatory scheme of the Act, and role of the postponement procedure in effectuating the Act's purposes, Judge Wisdom wrote for a unanimous court that the federal postponement provision should be strictly construed:

We cannot accept the Administrator's reading of the statute. Nothing in the statute supports the limitation of section 1857c-5(f) to situations involving sources so large that a single variance granted it threatens the attainment of a national ambient standard. Section 1857c-5(f) speaks in terms of "any stationary source," and the postponement of "any requirement of an applicable implementation plan." This language is not ambiguous and lends no basis for the construction the Administrator puts on it. [emphasis in the original.]

*Natural Resources Defense Council, et al., v. Environmental Protection Agency*, 489 F.2d 390, 401 (5th Cir. 1974).

The First Circuit, followed by the Eighth and the Second, also rejected out of hand the position now urged by EPA:

Had Congress meant § 1857c-5(f) to be followed only if a polluter, besides violating objective State requirements [i.e., compliance schedules, emission limitations, and similar regulatory provisions of the Plan], was shown to be preventing maintenance of a national standard, it would have said so. To allow a polluter to raise and perhaps litigate that issue is to invite protracted delay. The factual question could have endless refinements: is it the individual variance-seeker or others whose pollution is preventing maintenance of standards? See, e.g., *Getty Oil Co. v. Ruckelshaus*, 342 F.Supp. 1006 (D.Del. 1972), remanded with directions, 467 F.2d 349 (3rd Cir. 1972), cert. denied 41 U.S.L.W. 3392 (Jan. 15, 1973), where *Getty* raised this issue in various forums.

*Natural Resources Defense Council, et al., v. Environmental Protection Agency*, 478 F.2d 875, 886 (1st Cir. 1973).

The two leading courts did not reach precisely the same result, however, because the First Circuit failed to implement the logic of its reading of the statute. Rather, stating its concern that the States have "flexibility" in the period prior to the date they had promised to meet the National Standards, the court held that the federal provision pre-empted only in the "post-attainment period." 478 F.2d 875, 887. As shown below,<sup>38</sup> this position was considered and rejected by Congress when it passed § 110 (f), and is not in fact necessary to provide the flexibility the Court sought. With the "attainment date" fast approaching for most States, however, the practical difference between this interpretation and that of the Fifth Circuit is disappearing; and in any case, EPA's position can draw no sustenance from either of them.

**C. EPA Has Abandoned In Its Own Regulations The Position It Urges On The Court Here.**

EPA has repeatedly promulgated federal regulations that are premised on the fact that ambient air quality standards, though essential as the goal for State Implementation Plans and for determining the general State emission limitations, are not a proper tool for the regulation of specific sources of pollution. Until recently, however, it retained the regulation that was declared illegal by the court below. This regulation provided that:

A State's determination to defer the applicability of any portion(s) of the control strategy with respect to such [an individual] source(s) will not necessitate a request for a postponement under this section unless such deferral will prevent attainment or maintenance of a national standard within the

<sup>38</sup> See 34, *infra*.

time specified in such [State Implementation] plan: *Provided, however*, that any such determination will be deemed a revision of an applicable plan under [40 C.F.R. § 51].6.

40 C.F.R. § 51.32(f), originally promulgated as 42 C.F.R. § 420.32(f), 36 Fed. Reg. 15486, 15494 (Aug. 14, 1971). In September, 1974, however, after the filing of its petition for review in this case, the Agency promulgated new regulations that revised this regulation and abandoned entirely its claims that the applicability of the federal postponement procedure depends on whether a source's request for more time would prevent the attainment or maintenance of a National Standard. These regulations also ended the Agency's attempt to find support for this position in the revision sections of the statute. 39 Fed. Reg. 34533-37, 34535 and 34572-74 (Sept. 26, 1974).

In other contexts, EPA has for some time taken the position that air quality measurements (or estimates) are not a proper mechanism for regulating individual pollution sources. For example, in proposed regulations to implement this Court's ruling on significant deterioration,<sup>39</sup> EPA had the following to say about one of the techniques for relating emissions from individual sources to ambient air quality:

Current diffusion modelling techniques, when uncalibrated and used in the absence of baseline air quality data, *can exhibit random errors as high as a factor of two [100%] for short term concentrations and a factor of 1.5 [50%] for annual averages* when compared with known concentrations of pollutants. It should be noted that in assessing most average concentrations, particularly those resulting

<sup>39</sup> *Sierra Club v. Ruckelshaus*, 344 F.Supp. 253 (D.D.C. 1972), *aff'd per curiam* without opinion by the D.C. Court of Appeals, *aff'd* by an equally divided Court, 412 U.S. 541 (1973).



from multiple sources, significantly better accuracy can be obtained. However, this is not the type of application normally associated with the significant deterioration concept, which calls for pre-construction review of *individual new sources*. [emphasis supplied]

39 Fed. Reg. 31000, 31003 (Aug. 27, 1974).

The Agency has also rejected the use of so-called "intermittent" or "supplementary" controls, an alternative to emission limitations that depends on ambient air quality as the trigger for invoking control actions, on the grounds that with rare exceptions ambient air quality measurements are not adequate or enforceable with respect to individual sources.<sup>40</sup>

These regulations obviously conflict with the position EPA took in its original regulation concerning State variances, quoted above. Until recently, however, EPA clung to its variance regulation, even in the face of the adverse court decisions described in the previous section. In September, 1974, however, the Agency promulgated new regulations that revised its variance regulations, abandoning entirely the position the Agency now urges before this Court. These regulations revised 40 C.F.R. § 51.32(f), to read as follows:

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<sup>40</sup> In July, 1972, EPA rejected any use of intermittent controls because it did not believe that emissions could be related to ambient air quality with sufficient certainty to assure enforceability. 37 Fed. Reg. 15095 (July 27, 1972). In a later proposed rule-making, EPA proposed to allow the use of intermittent controls only on "isolated sources," which would "assume responsibility for all ground-level concentrations of the pollutant covered by the supplementary control system in all areas significantly affected by its emissions." Proposed Appendix P to 40 C.F.R. Part 51, 38 Fed. Reg. 25697 (Sept. 14, 1973). Perhaps because of EPA's continuing doubts about whether intermittent controls can be enforced, the Agency did not promulgate these proposed regulations. Recently it disapproved a State regulation that would have allowed the unrestricted use of intermittent controls. 39 Fed. Reg. 29357 (Aug. 15, 1974).

A State's decision to defer the date by which a source must achieve compliance with an applicable plan provision will not necessitate a request for a postponement under this section [40 C.F.R. § 51.32] if the deferral meets the following requirements:

(1) Compliance is not deferred beyond the applicable attainment date specified in Part 52 of this chapter [the date(s) chosen by the States for attainment of the National Primary and Secondary Ambient Air Quality Standards] . . .

39 Fed. Reg. 34533, 34535 (Sept. 26, 1974).

At the same time, the Agency disapproved all State variance statutes, 39 Fed. Reg. 34535-37, promulgating new regulations for compliance schedules and proposing a substitute federal regulation to replace the disapproved variance statutes, 39 Fed. Reg. 34572, 34573. In explaining the reason for this decision, the Agency cited the decisions of four Courts of Appeal, and purported to adopt the interpretation of the statute given by the First Circuit Court of Appeals.

Because of the different interpretation of the statute rendered by the Fifth Circuit, EPA did not attempt to make these regulations binding on the States within the jurisdiction of that court, 39 Fed. Reg. 34533. But the regulations do represent a binding public declaration that the Agency has now abandoned entirely the claim that federal pre-emption of State variance laws occurs only when a proposed variance would prevent the attainment or maintenance of a National Standard, and discarded its attempt to find support for this position in the revision authority of the Clean Air Amendments. While these new regulations still do not comport with the proper interpretation of the statute given by the court below, they do evidence clearly EPA's agreement that the position it now urges before this Court cannot be supported by reference to the Clean Air Amendments.

**D. The Legislative History Of The Act Demands That Postponements Be The Exclusive Means Of Relief.**

The foregoing demonstrates that EPA's interpretation of the federal postponement provision cannot be squared with the language or structure of the Clean Air Amendments, with the relevant court interpretations or even with EPA's own administrative interpretation of the Clean Air Amendments. The remaining legal question is whether the Fifth Circuit, or the First, Eighth and Second, correctly interpreted the law. The Fifth Circuit's opinion, in addition to its greater faithfulness to the plain language of the statute, is also the only one consistent with the legislative history of the Act.

The legislative history of the Clean Air Amendments shows that Congress considered other schemes for dealing with variances, among them the one urged by the First Circuit, but rejected them in favor of pre-empting State variance procedures entirely. This choice was a necessary concomitant of the Congress' decision, consistent with its often-stated desire to return the air to healthful quality as quickly as possible, to require the States to meet the National Air Quality Standards "as expeditiously as practicable." Section 110(a)(2)(A), 42 U.S.C. § 1857c-5(a)(2)(A). See note 19, *supra*.

The ancestors of the provision at issue in this case were drawn on the assumption that the statutory deadline for attaining the National Standards was a flat three years. The Senate-passed bill contained two provisions for altering a State Plan. S. 4358, Sections 111(e) and (f), S. Rep. No. 91-1196, 91st Cong., 2d. Sess. (1970) at 89. Section 111(e) of the bill was plainly the forerunner of the "revision" sections (Section 110(a)(2)(H) and (a)(3) of the Act).<sup>41</sup> It would have pro-

<sup>41</sup> § 111(e) of the bill is printed at App. 34.

vided that if the Secretary<sup>42</sup> determined, on the basis of new studies or other information, that a State Plan was inadequate to attain the National Standards, he must give the State a chance to revise its plan; in the event that it did not, he must promulgate a revised Plan adequate to meet the Standards.

The bill would have limited revisions even more closely than the Act does; a Plan could have been revised only when the Secretary had determined it was inadequate to reach the Standards. In the Act, the revision procedure was given a slightly wider, though still circumscribed, scope, and a provision that would have allowed the Secretary to extend the State's deadline for meeting National Standards through a revision was placed in a separate section (§ 110(e), 42 U.S.C. § 1857c-5(e)) from the revision authority in order to reinforce the distinction between changes that hastened or assured attainment of healthful air quality, and those that slowed it. See 24-28 *supra*.

Section 111(f) of the bill was the ancestor of the present "postponement" provision, now contained in Section 110(f).<sup>43</sup> It would have allowed a three judge federal court, at the request of the source (conveyed through the State Governor), to grant "relief from the effect of such expiration [of the deadline for meeting National Standards]" to an individual source. That is, the court could have allowed delay in meeting the requirements of an approved Plan applicable to the source, such as

<sup>42</sup> At the time the Senate wrote the bill, it would have been administered by the National Air Pollution Control Administration of the Department of Health, Education, and Welfare. Before final passage of the Act, EPA was created. Thus the bill refers to the "Secretary" where the Act uses "Administrator."

<sup>43</sup> § 111(f) was the precursor of both the postponement and extension provisions of the Act. The extension provision is not at issue in this case. See note 35, *supra*. The text of proposed § 111(f) is reprinted at App. 34-36.

a compliance schedule or emission limitation. In other words, under the bill what is now the "postponement" procedure would have been confined exclusively to situations where a polluter sought to continue violating the State emission limitations beyond the bill's three year deadline meeting for the National Air Quality Standards. In short, the Senate bill, consistent with its three-year deadline for attaining the National Standards, would have pre-empted State variance laws only in the post-attainment—as it was then written, post-three year—period.<sup>44</sup>

The Senate bill was altered in the Conference Committee to provide that a source's attempt to delay compliance with "any requirement" of a State Plan would be considered a "postponement," while an enlargement of the three-year maximum time period for meeting the National Standards in an Air Quality Control Region or State as a whole would be considered an "extension."<sup>45</sup>

This change was necessary to conform this provision with the change in the deadline for attaining the National Primary Standards made by the Conference Committee. The Senate-passed bill would have required only that the States meet the National Standards "within three years from the date of [the Plan's] approval." S. 4358, § 111(a)(2)(A), S. Rep. No. 91-1196, 91st Cong., 2d Sess. 87 (1970).

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<sup>44</sup> But even the Senate bill would not have sanctioned allowing the States to control the triggering of the postponement procedure by deciding whether a polluter was causing a violation of National Standards. Under the bill, triggering would have been automatic: prior to the statutory deadlines, the postponement procedure would not have applied; after the deadline, it would have. The bill, in other words, would have adopted the First Circuit position, *see* 30, *supra*.

<sup>45</sup> *See* n. 35 *supra*. This change was considered important enough for comment in even the cursory discussion in the Conference Committee's Report, H. Rep. No. 91-1783, 91st Cong., 2d Sess. 45 (1970).

This language was strengthened by the Conference Committee. Seeking to assure healthful air quality as soon as possible, The Committee replaced the Senate's three-year deadline with language that required the State Plans to

Provide for the attainment of such primary [National Air Quality] standard, *as expeditiously as practicable* but in no case later than three years from the date of [the Plan's] approval [emphasis supplied.]

§ 110(a)(2)(A), 42 U.S.C. § 1857c-5(a)(2)(A).

Thus, the law does not leave the State free to take three years to attain the National Standards, as EPA's Brief assumes,<sup>16</sup> if they can accomplish it sooner. A State must provide for meeting the National Standards as soon as possible, using all the means "practicable" to accomplish this task. The earliest date "practicable" is the date the State must choose.<sup>17</sup>

Under the language of the Senate bill, it would have been possible for a State to grant a variance without preventing it from attaining the National Standards within the mandated deadline, since this would have been a flat three years. But under the Act this is impossible, since the States must choose to meet the Standards at the earliest "practicable" date. To attain the National Standards "as expeditiously as practicable" can have only one meaning: that the State has required the maxi-

<sup>16</sup> EPA's Brief 10-12, 28.

<sup>17</sup> Curiously, EPA's original regulation on variances, 40 CFR § 51.32, since abandoned by the Agency (*see* 30, *supra*) also adopted Petitioners' reading of "as expeditiously as practicable." It provided that States should determine whether a proposed variance would prevent attainment of the Standards "within the time specified in such a plan," 40 CFR § 51.32(f), not "by the end of a three-year period," as would be consistent with the present interpretation adopted in EPA's Brief.

imum available controls on all sources at the earliest possible date. Thus *any* variance would, *a fortiori*, delay the attainment of the National Standards beyond the date previously considered the earliest one practicable."

In short, the logic of the Act dictates that there simply are no cases where States can grant variances that will not affect their ability to meet the National Standards within the statutory deadline. EPA's claim that there are such situations amount to either (1) ignoring the fact that Congress materially altered the Senate bill in Conference, or (2) an admission that the Agency failed to meet its statutory obligation to assure that the States chose to attain the Standards at the earliest practicable date.

Against this solid evidence of Congressional intent, EPA is able to muster only an equivocal quotation from Senator Muskie in his introduction of the conference bill in the Senate. EPA's Brief 26. Discussing the federal postponement provision, he said that it would allow "A Governor [to] apply for a postponement of the deadline, if, when the deadline approaches, it is impossible for a source to meet a requirement under an implementation plan . . . ." 116 Cong. Rec. S42384-5 (daily ed., Dec. 18, 1970). Whether the Senator correctly referred to the "deadline" embodied in a State compliance schedule, or was merely thinking of the rejected language that had previously been included in the bill reported from his Senate Subcommittee is unclear. In any case, it is pale authority with which to refute the actual

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<sup>10</sup> For example, a State may have provided, in its Plan, that it would meet the National Standard for sulfur oxides by the end of 1974, by requiring, among other things, large fossil-fueled power plants to install equipment to remove sulfur from their exhaust gas streams by that time. If such sources were then granted variances, perhaps because their suppliers were unable to provide the necessary equipment until six months later, the State would be forced to meet the National Standards that much later.

changes in the language of the bill made by the full Conference Committee.

## II. INTERPRETING THE POSTPONEMENT PROVISION AS WRITTEN IS CRUCIAL TO THE ATTAINMENT OF THE CONGRESSIONAL PURPOSE.

In examining the policy issue presented in this case, it is important to keep in mind the purpose of the Clean Air Amendments. This law was passed because of the acknowledged hazards to human health and welfare posed by air pollution—hazards, which as anyone who walks the streets of any major American city knows, have gotten worse at a rapidly accelerating rate in the last two or three decades.

The Act was intended to reverse this trend, drastically reducing the usually unnecessary and often wasteful emissions of pollutants that produce this public health menace.

The regulatory system designed to achieve this objective is a complex one, but it is all built on a very sage judgment about human nature: people are far more likely to take a task seriously if they are given a deadline for completing it, and told that the deadline will be difficult to escape. If this Court should reach for an interpretation outside the language of the statute, as EPA urges it to, this objective will be thwarted. The force of the deadlines for attaining healthful air quality will be largely broken, and the Congressional purpose therefore subverted.

Under the postponement procedure, Congress made the granting of additional compliance time dependent on three basic factors: a history of good faith effort by the source to abate emissions, a judgment that technology to do better is not yet available, and a conclusion that the benefits of continued operation outweigh the dangers it



poses to the health and welfare of people. To ensure that these factors were judged by uniform standards, it placed the decision in EPA, rather than the 50 different State governments. It avoided having EPA make judgments about the effect of the source of ambient air quality, because, as we have seen, such a judgment cannot be made accurately, and because it knew from past experience that depending on such an uncertain standard provided recalcitrant polluters with the room for debate that would maximize pressure for concessions by regulatory agencies and for challenge in the courts, rather than the incentive to act expeditiously to control emissions.

Both the Fifth and the First Circuits understood and endorsed these sound considerations of public policy. Quoting Senator Muskie, the Fifth Circuit noted the importance of applying the postponement provision to all attempts to extend compliance schedules:

"The first responsibility of Congress is not the making of technological or economic judgments—or even to be limited by what is or appears to be technologically or economically feasible. Our responsibility is to establish what the public interest requires to protect the health of persons. This may mean that people and industries will be asked to do what seems to be impossible at the present time. But if health is to be protected, these challenges must be met."

116 Cong. Rec. S16091 (daily ed. Sept. 21, 1970), quoted at Note *supra*, at 581. In a statute that constituted a "challenge to do what seem[ed] impossible," seeking to "forc[e] technology to catch up with the newly promulgated standards," it was essential to include a device to ensure that ambitious commitments made at the planning stage could not readily be abandoned when the time came to meet those commitments, and to assume the costs and burdens they entailed.

The First Circuit put it more succinctly:

To allow a polluter to raise and perhaps litigate that issue [the effect of a variance on air quality] is to invite protracted delay. The factual question could have endless refinements: is it the individual variance-seeker or others whose pollution is preventing maintenance of standards? See e.g., *Getty Oil v. Ruckelshaus*, 342 F.Supp. 1006 (D. Del. 1972), remanded with directions, 467 F.2d 349 (3rd Cir. 1972), cert. denied, 41 U.S.L.W. 3392 (Jan. 15, 1973), where *Getty* raised this issue in various forums.

478 F.2d 875, 886.

Throughout the other briefs before the Court, these sound considerations of public policy are hardly mentioned. Instead, both the government and the *amici curiae* intently assert, without evidence, reasons why they claim the postponement procedure will not work,<sup>59</sup> or will not accomplish the purpose Congress intended.<sup>60</sup>

The short answer to these claims, of course, is that they are irrelevant to the case before this Court. The question here is what Congress said and intended, not whether the mechanism chosen was the best one possible. See 21-28, *supra*. As we have shown previously, Congress considered a number of possible alternative systems for handling the problem of sources that could not, or did not want to, comply with the requirements of State Implementation plans. The one urged by the First Circuit (and EPA in its September 26, 1974, regulations) was embodied in the Senate bill, and the one supported by EPA here was contained in the House and Administra-

<sup>59</sup> EPA's Brief 28-30; Brief of *amicus curiae* Edison Electric Institute 21-26.

<sup>60</sup> EPA's Brief 41-46; Brief of *amicus curiae* Edison Electric Institute 21-26.

tion bills. Congress heard the arguments for these alternatives, and decided to reject them. If EPA and the regulated industries disagree with that judgment, they may urge them once again on the legislature. Since these objections have been raised here, however, respondents believe the Court should be aware of their deficiencies.

**A. Pre-emption Of State Variance Laws By The Federal Postponement Procedure Would Not Increase The Burden Of Administering The Clean Air Act.**

Under the system urged by EPA, a request by a source for deferral of compliance beyond the end of its compliance schedule sets in motion a series of administrative determinations. In the first instance, a State agency must convene a proceeding to review the request for a variance under State law. Under most State variance laws, the agency must consider the same questions that must be considered under the federal postponement provision, as well as others. Most State laws allow the source to raise the issue of cost, a complex issue which may not be raised in a postponement proceeding.<sup>51</sup> In order to comply with EPA's interpretation the State must also take evidence on whether the requested variance will result in pollution exceeding the National Air Quality Standards, a question which also is not germane in a postponement proceeding.

If the State decides that a postponement proceeding is not called for, its proposed variance will undergo the "revision" procedure provided in EPA's regulations. 40 C.F.R. § 51.6. The revision process can, and frequently

<sup>51</sup> Congress reached its own policy decision on how to strike the balance between protection of the public and economic costs, and consistently avoided allowing the cost issue to be injected into proceedings with respect to individual sources. See, e.g., S. Rep. No. 91-1196 2 (1970), and Natural Resources Defense Council, et al., v. Environmental Protection Agency, 478 F.2d 875, 888-889 (1st Cir. 1973), Natural Resources Defense Council, et al., v. Environmental Protection Agency, 489 F.2d 390, 411-413 (5th Cir. 1974).

does, take months to complete; and delays of over a year in revision approval by EPA are not uncommon. The steps in the revision process are numerous: the State must first publish notice of the proposed revision, make available the proposal, and hold a public hearing normally no sooner than 30 days after the proposal is available. 40 C.F.R. §§ 51.4, 51.6(f). The State must then consider the hearing record, formally adopt the revision, and submit it to EPA for review. 40 C.F.R. § 51.6(d). EPA then begins review and, if it determines the revision may be approvable, publishes a notice of receipt of the revision in the Federal Register, giving a minimum of 30 days for public comment. EPA apparently takes the position that it is not required to approve or disapprove such revisions within a specific period of time, for the Agency has on a number of occasions allowed more than a year to pass between the submission of a revision and EPA approval or disapproval action.<sup>52</sup>

Thus, the revision process is a long one and no requirements for expeditious handling are recognized by any of the participants. And, if, after analyzing a proposed State variance, EPA concludes that the variance would jeopardize a National Standard, EPA must then undertake a postponement proceeding anyway.

In short, the procedure urged by EPA is one that requires administrative duplication and examination of sev-

<sup>52</sup> For example, on September 10, 1973, the State of Washington submitted a proposed Plan revision to EPA. EPA published notice of receipt of this revision on November 15, 1973. 38 Fed. Reg. 31513. On September 20, 1974, a year after the revision was submitted to the Agency, EPA asked Washington State to provide additional supportive information. To date, the revision has still not been approved. *See also*, Tennessee Revision: submitted to EPA on June 27, 1973; Federal Register notice published December 14, 1973, 38 Fed. Reg. 34477; EPA approval of the revision on August 8, 1974, 39 Fed. Reg. 28528. *See also*, Connecticut Revision: State hearings held, August 9-15, 1973; submitted to EPA, January 9, 1974; EPA notice in the Federal Register, April 26, 1974, 39 Fed. Reg. 14728; EPA has still not approved it.

eral additional issues of fact. Even if the State and EPA ultimately agree that a postponement proceeding is not called for, this multi-stage process is hardly a model of dispatch. The simple fact, ignored in EPA's brief, is that any request for additional time for compliance, no matter how the agencies deal with it, will consume considerable administrative resources and time.

It would thus appear that EPA's real concern is not the total administrative costs or burden of the two alternatives, but rather the *distribution* of the burden. Under EPA's proposed scheme, the State agencies, which are largely underfunded and undermanned,<sup>53</sup> would be forced to share the costs of considering requests for additional time. The statutory scheme would relieve the States of these costs by placing them on EPA. While the phenomenon of bureaucratic self-protection is a well-known one, it is hardly an excuse for bending the Congressional mandate.

EPA also seems to assume that the number of requests for additional time will be the same under either its proposal or the statutory postponement system. This sugges-

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<sup>53</sup> According to EPA's *State Air Pollution Implementation Plan Progress Report, January 1 to June 30, 1974*:

Control agency resources are being strained by the increased program demands being placed upon them . . . At present the control agencies are approximately 3000 man-years below the estimate of needed resources. [p. 2].

The anticipated 1975 and 1977 expenditures for accomplishment of the basic SIP and anticipated revisions are approximately \$188 million and \$210 million, respectively. In 1974, the agencies had available approximately 69 percent of the funds stated as needed by 1975. Approximately one-third of the States spent less than 60 percent of their stated revised 1975 needs. [p. 108].

U.S. Environmental Protection Agency, Office of Air and Waste Management, Office of Air Quality Planning and Standards, Research Triangle Park, N.C., *State Air Pollution Implementation Plan Progress Report, January 1 to June 30, 1974* (1974).

tion indicates just how much the Agency has lost sight of the animating concepts of the law. For the whole purpose of enacting the postponement provision, and its certain effect, was to encourage efforts to comply by discouraging applications for more time from all but those sources that could clearly establish their inability, despite their best efforts, to meet their previously negotiated timetables for compliance. See discussion *supra*, at 14. If Congress was right, then the total administrative burden will be smaller if the law is construed correctly than it will be under the scheme proposed by EPA, even if each individual application requires more time for consideration. If the Congress was wrong, the net result will be to add nothing to the burden EPA and the States are already carrying. If Congress is right, the likelihood of curtailing the death, illness, and discomfort caused by pollution will be increased. EPA's proposal, which would prevent even giving the Congressional scheme a test, would have little chance of accomplishing this result.

**B. The States Did Not Rely On EPA's Erroneous Interpretation Of § 110(f).**

EPA's brief also claims that the Administrator's erroneous interpretation of § 110(f) was justified as a means to encourage the States to pick early dates for the expiration of compliance schedules and the attainment of National Air Quality Standards.<sup>54</sup> Thus the Agency says it would be unfair to the States that chose early dates in reliance on this interpretation to change the rules of the game now. This argument is mere post-hoc rationalization. EPA had no need to resort to such tactics, nor did EPA's interpretation affect the States' compliance schedules or attainment dates.

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<sup>54</sup> EPA's Brief 29-30, 41.

**1. EPA's Interpretation Was Not Needed to Induce the States to Choose the Most Expeditious Practicable Attainment Dates.**

The Administrator is not so impotent under the statute that he needed to coax the States into committing themselves to meeting the National Standards expeditiously. As we have noted repeatedly, an acceptable State Plan must provide for attainment of the National Primary Standards "as expeditiously as practicable." § 110(a)(2)(A), 42 U.S.C. § 1857c-5(a)(2)(A). See discussion *supra*, note 19. The law also mandates EPA to disapprove a Plan that adopts a later attainment date and to promulgate substitute federal regulations adopting a more expeditious date. 42 U.S.C. § 1857c-5(c). EPA has used this power liberally. See 37 Fed. Reg. 10842, *et seq.*, (May 21, 1972), 40 C.F.R. Part 52. The Agency can not now claim that its erroneous interpretation of § 110(f) was necessary to entice the States into complying with the law.

**2. EPA's Interpretation Had No Effect on the Attainment Dates and Compliance Schedules Chosen by the States.**

If EPA's decision to allow variances was designed to induce early attainment dates and short compliance schedules, it was a total failure. All but three of the States chose to take at least the three years' maximum time allowed in the statute for the attainment of any National Standard that was being exceeded in an AQCR.<sup>55</sup> Eighteen States actually sought and obtained extensions of the deadline for meeting the National Primary Standards to *beyond* three years, in many cases up to the maximum five years permitted under the "extension" provision.<sup>56</sup>

<sup>55</sup> Only the plans for Texas, Virginia and Washington, among States where the Primary Standards were violated, provided for attainment of Standards prior to mid-1975. See 37 Fed. Reg. 10897, 10900, 10901 (May 31, 1972).

<sup>56</sup> 37 Fed. Reg. 10847 *et seq.* (May 31, 1972).

§ 110(e), 42 U.S.C. § 1857c-5(e). Thus if the Court requires a return to the proper interpretation of § 110(f), it will work no injustice on the States.

The same can be said for compliance schedules. EPA's own regulations and practices with respect to compliance schedules inadvertently prevented foreshortened expiration dates by encouraging States to negotiate and submit compliance schedules long after State Plans were approved. Though the statute provides that States were to have submitted their compliance schedules as part of their Plan (i.e., in January, 1972), § 110(a)(1) and (a)(2)(B), 42 U.S.C. § 1857c-5(a)(1) and (a)(2)(B), the Agency unilaterally extended this deadline, by regulation, until February 15, 1973.<sup>57</sup> Actually, few States met even that extended deadline, and EPA is still promulgating its approvals of State compliance schedules.<sup>58</sup> In nearly every State, in other words, the negotiation of compliance schedules occurred after respondents herein and others had filed suits across the country challenging EPA's decision to allow variances, and many, if not most, negotiations occurred after the First Circuit had declared

<sup>57</sup> 40 C.F.R. § 51.15(a)(2) provides

A plan may provide that compliance schedules for individual sources or categories of sources will be formulated following submittal of the plan. Such compliance schedules shall be submitted to the Administrator within 60 days following the date such schedule is adopted but in no case later than the prescribed date for submittal of the first semiannual report required by § 51.7. . . .

40 C.F.R. § 51.7, referred to in § 51.15, provides that semi-annual reports shall be submitted to the Administrator within 45 days of the end of prescribed semi-annual reporting periods. The first semi-annual report was not due until 45 days after December 31, 1972, or February 15, 1973. Thus the net effect of the Administrator's action was to defer the date for submission of compliance schedules until February 15, 1973.

<sup>58</sup> EPA has still not promulgated compliance schedules for a number of States. Of the remainder, many have been promulgated during 1974. See 40 C.F.R. Part 52.



EPA's interpretation illegal. *Natural Resources Defense Council, et al. v. Environmental Protection Agency*, 478 F.2d 875, 888 (1st Cir. 1973). Both the States and the Agency were on notice long ago that variances might not be available. Their reliance, if any, was plainly unjustified.

EPA has confused this issue by its failure to require some States to correct the failure in their State laws to distinguish between compliance schedules properly agreed-to when the State Plan was adopted, and later requests for additional compliance time. Some of the State laws that were enacted before the passage of the Clean Air Amendments adopt the fiction that emission limitations are immediately effective, subject to variances for non-complying sources. In developing their Implementation Plans, these States incorporated or adopted such "immediately effective" emission limitations, and later (pursuant to EPA's lenient policy on the submission of compliance schedules) began to submit State variances to satisfy the federal requirement for compliance schedules. Among these "variances" are the several thousand in the Fifth Circuit that EPA has referred to repeatedly before this Court.<sup>59</sup> Indeed it is fair to say that EPA's failure to correct this error in terminology when these States' Plans were submitted in 1972 is the reason why the Agency asked this Court to review the lower court's decision.<sup>60</sup>

EPA actually defined the term "compliance schedule" in 1972 in a way that would, if implemented, have solved this problem. In an amendment to its regulations, EPA defined a compliance schedule as:

The date or dates by which a source is required to comply with specific emission limitations contained

<sup>59</sup> Pet. for Certiorari 8; EPA's Brief 17, 42-43.

<sup>60</sup> Pet. for Certiorari, 5-6, 8-9.

in an implementation plan and with any increments of progress towards such compliance.

37 Fed. Reg. 26311 (Dec. 9, 1972), 40 C.F.R., § 51.1(p).

The accompanying definition of "increments of progress," in turn, made clear that the distinction, for purposes of federal law, between a compliance schedule and a true variance is that the former is individually negotiated as part of the Plan, while the latter is an attempt to extend a compliance schedule beyond its original expiration date. 40 C.F.R. § 51.1(q).

Thus EPA could have, and under the Act and its own regulations should have, prevented the present situation with a stroke of the pen. It still has this power. Instead, the Agency has chosen to ignore its own clarifying regulation, in the hope that it can use the ensuing confusion as a lever to coerce the courts into acceding to its incorrect interpretation of the postponement provision. This Court, like four of the five Courts of Appeal that considered the issue, should resist this attempt.

If EPA must disapprove the confused State schemes and promulgate federal regulations to take their place, that is a far better and more lawful result than for this Court to distort the plain meaning of the statute. Such a disapproval would not necessarily result in a significant burden on EPA, since it could simply promulgate a generic regulation converting *en mass* the variance-compliance schedules it has already approved into federal compliance schedules. This Court can make a clear statement that will prevent such a conversion from becoming a signal for frivolous challenges from the affected sources.

At the same time, however, EPA should be directed to clear up the grounds for the confusion which has brought this case before the Court. EPA should be ordered to disapprove prospectively all such confused State

schemes, and to promulgate clarifying federal regulations, pursuant to its powers under § 110(c) of the Act, 42 U.S.C. § 1857c-5(c), unless the States promptly correct their deficiencies. If such an order is issued, the Court will be free to place a proper interpretation on the statutory postponement and revision authorities without concern for its effect on the administration of the Act. Plainly, EPA should not be allowed to compound its original mishandling of these State laws by distorting the language and intent of Congress.

#### CONCLUSION

For the foregoing reasons, the decision of the court below should be affirmed.

Respectfully submitted,

RICHARD E. AYRES  
*Attorney for Respondents*

December, 1974

## Ga. Code Ann. § 88-912 (1971), VARIANCES.

The Department may grant specific or general classes of variances from the particular requirements of any rule, regulation or general order to such specific persons or class of persons or such specific source or general classes of sources of air contaminants upon such conditions as it may deem necessary to protect the public health and welfare, if it finds that strict compliance with such rule, regulation or general order is inappropriate because of conditions beyond the control of the person or classes of persons granted such variances, or because of special circumstances which would render strict compliance unreasonable, unduly burdensome, or impractical due to special physical conditions or causes, or because strict compliance would result in substantial curtailment or closing down of one or more businesses, plants or operations, or because no alternative facility or method of handling is yet available. Such variances may be limited in time. In determining whether or not such variances shall be granted, the Department shall give consideration to the protection of the public health, safety and general welfare of the public, and weigh the equities involved and the relative advantages and disadvantages to the resident and the occupation or activity affected. Any person or persons seeking a variance shall do so by filing a petition therefor with the Director of the Department. The Director shall promptly investigate such petition and make a recommendation as to the disposition thereof. If such recommendation is against the granting of the variance, a hearing shall be held thereon within 15 days after notice to the petitioner. If the recommendation of the Director is for the granting of a variance, the Department may do so without a hearing; provided, however, that upon the petition of any person aggrieved

by the granting of a variance, a public hearing shall be held thereon. A variance granted may be revoked or modified by the Department after a public hearing which shall be held after giving at least 15 days prior notice. Such notice shall be served upon all persons, known to the Department, who will be subjected to greater restrictions if such variance is revoked or modified, or are likely to be affected or who have filed with the Department a written request for such notification.

**In the Supreme Court of the United States**

**OCTOBER TERM, 1974**

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**No. 73-1742**

**RUSSELL E. TRAIN, ADMINISTRATOR, UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY, AND UNITED  
STATES ENVIRONMENTAL PROTECTION AGENCY, PETITIONERS**

**v.**

**NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL.**

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***ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE FIFTH CIRCUIT***

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**REPLY MEMORANDUM FOR PETITIONERS**

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1. Respondents' attack on EPA's interpretation of the Clean Air Act — permitting treatment of variances from state requirements as revisions of state implementation plans if they will not interfere with timely attainment of national air quality standards — rests upon a confusing characterization of the actions of EPA and the states concerning variances and compliance schedules. The Act provides that EPA shall approve a state implementation plan if it includes, *inter alia*, schedules and timetables for compliance with emission limitations contained in the plan. 42 U.S.C. 1857c-5(a)(2)(B). Given the substantial and often unprecedented obligations imposed by the Act and EPA's implementing regulations, many states were unable, during the nine-month period available for adoption of state plans, to develop fully the compliance schedules

that would be needed to implement those plans. As a result, during the period following adoption of state plans and their approval by EPA, many states have developed compliance schedules — either individually negotiated or covering categories of sources. Where state emissions limitations or other requirements are already in effect, such schedules typically must be approved as variances under state law.

The primary question presented in this case is whether EPA may approve such variances and compliance schedules as “revisions” of the already-approved state plan in accordance with Section 110(a)(3) of the Act, or whether it must treat them as “postponements” subject to Section 110(f). Had the states been able to complete the development of compliance schedules within the nine-month period, such schedules, even if involving variances from state law requirements, would, of course, have been subject to approval as elements of the plan itself under Section 110(a)(2), rather than as postponements.

Since most of the variances in question involve initial approval of compliance schedules, it is inaccurate to suggest that EPA seeks authority here only to treat as “revisions” extensions of previously-approved compliance schedules beyond expiration dates previously agreed to or otherwise established (Resp. Br. 48-49).<sup>1</sup>

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<sup>1</sup>Nor would a post-attainment date variance necessarily involve “an attempt to extend a compliance schedule beyond its original expiration date” (Resp. Br. 49). As the First, Second and Eighth Circuits have recognized, some authority to approve variances in the post-attainment period without resort to Section 110(f) should be recognized to accommodate such matters as “mechanical breakdowns and acts of God.” *Natural Resources Defense Council, Inc. v. Environmental Protection Agency*, 478 F.2d 875, 886 (C.A. 1); *Natural Resources Defense Council, Inc. v. Environmental Protection Agency*, 483 F.2d 690, 693-694 (C.A. 8); *Natural Resources Defense Council, Inc. v. Environmental Protection Agency*, 494 F.2d 519, 523 (C.A. 2).

Respondents suggest that EPA could deal with compliance schedules submitted after EPA's approval of state plans "with a stroke of the pen," by disapproving all such state-submitted schedules, most of which EPA has now approved as revisions, and by promulgating "a generic regulation converting *en mass* the variance-compliance schedules it has already approved into federal compliance schedules" (Resp. Br. 49). Respondents presumably refer to EPA's authority to promulgate state implementation plans or portions thereof pursuant to Section 110(c) of the Act. 42 U.S.C. 1857c-5(c).

EPA's authority under Section 110(c), however, would appear to be no greater than the authority of the states themselves under Section 110(a), concerning the adoption of plans and revisions thereof. If, as respondents now contend, compliance schedules may only be treated as postponements under Section 110(f), it is doubtful whether EPA could treat them as federal revisions under Section 110(c). In any event, such an approach would be fundamentally inconsistent with the policies of state responsibility and federal-state cooperation that underlie the Act. 42 U.S.C. 1857(a)(3).

2. Respondents assert that EPA's interpretation of the Act is inconsistent with EPA's criticism, in other contexts, of attempts to relate emissions from particular sources to air quality measurements (Resp. Br. 31-32). The quoted comment, however, was directed to the substantially different problem of determining how to regulate *future* sources of pollution, particularly in open Western areas, pursuant to a separate program under the Act to prevent degradation of air quality in areas already meeting national standards.



As a matter of technology, because of the possibility of calibration and the availability of baseline data, one may, however, accurately determine the effect of an existing source of pollution in an area with known air quality. Indeed, that type of analysis lay at the heart of the states' development, and EPA's approval, of implementation plans. Cf. 40 C.F.R. 51.12, *et seq.* Congress recognized EPA's ability to make such assessments in Section 4 of the Energy Supply and Environmental Coordination Act of 1974, 88 Stat. 256 (relied upon by respondents (Resp. Br. 27, n. 37) ), which amended Section 110(a)(3) of the Clean Air Act so as to require EPA to study all state plans and determine whether their emission standards relating to fuel-burning stationary sources or suppliers of fuel to such sources "can be revised \* \* \* without interfering with the attainment and maintenance of any national ambient air quality standard \* \* \*."

3. We have contended that EPA's original interpretation of the Act was intended to encourage states to make their limitations requirements effective earlier than mid-1975 or to adopt more rigorous standards than needed to assure timely attainment and maintenance of national standards (Pet. Br. 11, 29-30, 41). Respondents suggest that this premise was unsound because only three states established early dates for attainment of national standards (Resp. Br. 46).

In the first place, the reasonableness of EPA's interpretation would not be refuted even if it had been less effective in achieving this result than had been anticipated. In any event, respondents' reference to three states fails to distinguish between the deadline adopted by a state for attainment of national standards, and the deadline established for compliance with its emission limitations. It is true that most states where air quality exceeded national standards in 1972 established their attainment dates at the

end of the allowable three-year period.<sup>2</sup> In most of those same states, however, emissions limitations were made effective immediately or at dates long before the attainment date. These limitations are the crucial means to achieve timely attainment of national standards, and EPA's purpose of encouraging such immediately effective requirements, subject to necessary variances, was well-served.

4. Respondents repeatedly assert that EPA is urging upon this Court an interpretation of the Act that it has abandoned in its own regulations (e.g., Resp. Br. 16-17, 30-33). In fact, EPA has never receded from its original position that Section 110(f) is not the exclusive procedure for approval of variances from state law requirements and that such variances may be treated as revisions under Section 110(a)(3).<sup>3</sup> All that has happened is that EPA, as a matter of policy, chose not to persist in applying its original interpretation to the post-attainment period after EPA's position concerning that period had been rejected by four courts of appeals. As indicated in our opening brief, however, we still believe that EPA's original interpretation was reasonable and should have been sustained. While that interpretation is logically applicable to the post-attainment period as well as the pre-attainment period, only the latter is covered by the question presented in the petition. If this Court reverses the court of appeals' resolution of that question, the effect of

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<sup>2</sup>In view of EPA's unchallenged approvals of those attainment dates it must be assumed that earlier attainment dates were not "practicable" in those states. 42 U.S.C. 1857c-5(a)(2)(A)(i).

<sup>3</sup>In revising its regulations, EPA reiterated its view "that compliance date deferrals which do not go beyond applicable attainment dates for primary or secondary standards should be dealt with as a plan revision \* \* \*." 39 Fed. Reg. 34572.

the decision on EPA's authority in the post-attainment period will depend upon whether the Court follows the approach of the First Circuit, the Ninth Circuit, or EPA's original interpretation of its "revision" authority. While EPA favors the First Circuit's approach over that of the Fifth Circuit in the instant case, it would also favor its original approach or that of the Ninth Circuit over the decisions of either the First Circuit or the Fifth Circuit.

5. Respondents suggest that reversal of the court of appeals' decision will result in substantial adverse effects on the health of persons because some sources of air pollution will consequently be permitted to operate, rather than be required to shut down. This contention ignores the fact that the interpretation of the Clean Air Act we urge would permit a state to revise its implementation plan by granting a variance, subject to the approval of EPA, only if the variance would not interfere with the state's attainment or maintenance of primary air quality standards. By definition, those standards have been set by EPA at levels that, "allowing an adequate margin of safety, are requisite to protect the public health." 42 U.S.C. 1857 c-4(b)(1). The Act provides a judicial remedy for those who think the standards adopted inadequate (42 U.S.C. 1857h-5(b)(1)),<sup>4</sup> and the present case, therefore, should

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<sup>4</sup>See e.g., *Kennecott Copper Corp. v. Environmental Protection Agency*, 462 F.2d 846 (C.A.D.C.). EPA may also be asked to exercise its authority to revise previously promulgated national standards. Cf. 42 U.S.C. 1857c-5.

be decided on the presumption that the states and EPA will adequately protect the public health by insisting that variances do not interfere with attainment or maintenance of those standards.

The judgment of the court of appeals should be reversed.

Respectfully submitted.

ROBERT H. BORK,  
*Solicitor General.*

JANUARY 1975.

(Slip Opinion)

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337.

## SUPREME COURT OF THE UNITED STATES

Syllabus

### TRAIN, ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY, ET AL. v. NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR  
THE FIFTH CIRCUIT

No. 73-1742. Argued January 15, 1975—Decided April 16, 1975

Under the Clean Air Act Amendments of 1970, which establish a program for controlling air pollution, the Environmental Protection Agency (EPA) is required to set "ambient air" quality standards which, in EPA's judgment, are "requisite to protect the public health," § 109 (b) (1) ("primary" standards), and "requisite to protect the public welfare from any known or anticipated adverse effects associated with the presence of such air pollutant in the ambient air," § 109 (b) (2) ("secondary" standards). Each State after promulgation of these standards must submit an implementing and maintenance plan, which must be approved by EPA, if, *inter alia*, it meets eight general conditions set forth in § 110 (a) (2), the principal one of which is that the plan provide for the attainment of the national primary ambient air quality standards in the State "as expeditiously as practicable" but no later than three years from the date of the plan's approval. § 110 (a) (2) (A). The State's plan must include emission limitations, schedules, compliance timetables, and other measures insuring timely attainment and subsequent maintenance of the national standards. In order to develop the requisite plan within the statutory deadline, Georgia elected to follow an EPA-endorsed approach providing for immediately effective categorical emission limitations accompanied, however, by a variance procedure whereby particular sources could obtain individually tailored relief from the general requirements. Section 110 (a) (3) provides that EPA shall approve any "revision" of an implementation plan that meets the § 110 (a) (2) require-

Syllabus

ments applicable to an original plan, and EPA, concluding that that provision permits a State to grant individual variances meeting § 110 (a) (2) requirements from generally applicable emission standards, both before and after the attainment date, approved the Georgia plan. Respondents initiated review proceedings in the Court of Appeals, taking the position that variances applicable to individual sources may be approved only if they meet the much more stringent procedural and substantive standards of § 110 (f), which, upon application prior to the compliance date for a stationary source or class of moving sources, permits "postponements" of no more than one year of any requirement of a plan, subject to specified conditions. That court upheld respondents' contentions and ordered EPA to disapprove Georgia's variance provision. *Held*: EPA's construction of the Act permitting treatment of individual variances from state requirements as "revisions," under § 110 (a) (3), of state implementation plans if they will not interfere with timely attainment and subsequent maintenance of national air quality standards, rather than as "postponements" under § 110 (f), was sufficiently reasonable to preclude the Court of Appeals from substituting its judgment for that of the EPA. Pp. 13-37.

(a) Section 110 (f) is a safety valve by which may be accorded, under certain carefully specified circumstances, exceptions to the mandatory deadlines for meeting national standards, and, contrary to respondents' contention, does not constitute the sole mechanism by which exceptions to a plan's requirements may be obtained. Pp. 16-22.

(b) This concept of § 110 (f)'s limited role is reinforced by comparison with § 110 (e), which permits a two-year extension of the three-year period referred to in § 110 (a) (2) (A) (i) on a showing far less stringent than that required for a § 110 (f) one-year postponement, which would be inexplicable were § 110 (f) the sole mechanism for States to modify their initial formulations of emission limitations. Pp. 22-24.

(c) Noting that § 110 (f) provides that a postponement may be granted with respect to the date that "any stationary source" must comply with "any requirement of an applicable state implementation plan," the Court of Appeals reached an erroneous conclusion that the § 110 (f) procedure was exclusive; the language of that provision does not mandate that all modifications of a plan's requirements necessarily be treated as postponements, precluding other forms of relief. Pp. 25-26.

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(d) The Court of Appeals also erred in its conclusion that "a revision is a change in a generally applicable requirement," whereas a "postponement or variance" deals with particular parties, for here the implementation plans being revised are quite detailed; moreover, the court's analysis overlooks obvious distinctions between revisions and postponements in the statutory context. Pp. 27-28.

(e) Section 110 (a) (3) revisions are granted by EPA only if they comport with the § 110 (a) (2) (A) requirement that the national standards be attained as expeditiously as practicable and thereafter maintained, so the "technology forcing" nature of the Amendments is no reason for judging under § 110 (f) variances which qualify for approval under § 110 (a) (3). Pp. 28-29.

(f) Congress felt that EPA could effectively perform the measurement and predictive functions necessary reliably to pass on variances as revisions under § 110 (a) (3). Pp. 29-32.

(g) Respondents' argument that because any variance would delay attainment of national standards beyond what was previously considered as the earliest practicable date, and that because the Act requires attainment as soon as practicable, any variance must therefore be treated as a postponement, is not supported by the legislative history or otherwise. Pp. 32-35.

(h) Respondents' contention, based on § 110 (a) (2) (H), that revision authority is limited to general changes initiated by EPA in order to "accelerate abatement or attain it in greater concert with other national goals," is specious. That provision, which does no more than impose a minimum requirement that state plans be capable of such modifications as are necessary to meet the basic goal of cleansing the ambient air to the extent necessary to protect public health, as expeditiously as possible within the three-year period, does not prevent the States from also permitting ameliorative revisions not contrary to that goal. Pp. 35-36.

489 F. 2d 390, reversed and remanded.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, STEWART, WHITE, MARSHALL, and BLACKMUN, J.J., joined. DOUGLAS, J., dissented. POWELL, J., took no part in the consideration or decision of the case.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

## SUPREME COURT OF THE UNITED STATES

No. 73-1742

Russell E. Train, Administrator,  
United States Environmental Protection  
Agency, et al.,  
Petitioners,  
v.

Natural Resources Defense  
Council, Inc., et al.

On Writ of Certiorari to  
the United States Court  
of Appeals for the Fifth  
Circuit.

[April 16, 1975]

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

We granted certiorari in this case. — U. S. — (1974), to review a judgment of the Court of Appeals for the Fifth Circuit which required the petitioner, Administrator of the Environmental Protection Agency, to disapprove a portion of the implementation plan submitted to him by the State of Georgia pursuant to the Clean Air Act Amendments of 1970.<sup>1</sup> The case presents an issue of statutory construction which is illuminated by the anatomy of the statute itself, by its legislative history, and by the history of congressional efforts to control air pollution.

### I

Congress initially responded to the problem of air pollution by offering encouragement and assistance to the

<sup>1</sup> *Natural Resources Defense Council, Inc. v. Environmental Protection Agency*, 489 F. 2d 390 (CA5 1974). We issued a stay of the contested portion of the court's judgment on June 10, 1974, 417 U. S. 942.



## 2 TRAIN v. NATURAL RESOURCES DEF. COUNCIL

States. In 1955 the Surgeon General was authorized to study the problem of air pollution, to support research, training and demonstration projects, and to provide technical assistance to state and local governments attempting to abate pollution. 69 Stat. 322-323. In 1960 Congress directed the Surgeon General to focus his attention on the health hazards resulting from motor vehicle emissions. 74 Stat. 162. The Clean Air Act of 1963, 77 Stat. 392-401, authorized federal authorities to expand their research efforts, to make grants to state air pollution control agencies, and also to intervene directly to abate *interstate* pollution in limited circumstances. Amendments in 1965, 79 Stat. 992-996, and in 1966, 80 Stat. 954-955, broadened federal authority to control motor vehicle emissions and to make grants to state pollution control agencies.

The focus shifted somewhat in the Air Quality Act of 1967, 81 Stat. 485. It reiterated the premise of the earlier Clean Air Act "that the prevention and control of air pollution at its source is the primary responsibility of States and local governments." *Ibid.* Its provisions, however, increased the federal role in the prevention of air pollution, by according federal authorities certain powers of supervision and enforcement. But the States generally retained wide latitude to determine both the air quality standards which they would meet and the period of time in which they would do so.

The response of the States to these manifestations of increasing congressional concern with air pollution was disappointing. Even by 1970, state planning and implementation under the Air Quality Act of 1967 had made little progress. Congress reacted by taking a stick to the States in the form of the Clean Air Amendments of 1970, Pub. L. 91-604, 84 Stat. 1676, enacted on December 31 of that year. These Amendments sharply increased federal authority and responsibility in the continuing

effort to combat air pollution. Nonetheless, the Amendments explicitly preserved the principle that, "Each State shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State . . . ." § 107 (a) of the Clean Air Act, as added, 84 Stat. 1678, 42 U. S. C. § 1857c-2 (a). The difference under the Amendments was that the States were no longer given any choice as to whether they would meet this responsibility. For the first time they were required to attain air quality of specified standards, and to do so within a specified period of time.

The Amendments directed that within 30 days of their enactment the Environmental Protection Agency should publish proposed regulations describing national quality standards for the "ambient air," which is the statute's term for the outdoor air used by the general public. After allowing 90 days for comments on the proposed standards, the Agency was then obliged to promulgate such standards. § 109 (a)(1) of the Clean Air Act, as added, 84 Stat. 1679, 42 U. S. C. § 1857c-4 (a)(1). The standards were to be of two general types: "primary" standards, which in the judgment of the Agency were "requisite to protect the public health," § 109 (b)(1), and "secondary" standards, those that in the judgment of the Agency were "requisite to protect the public welfare from any known or anticipated adverse effects associated with the presence of such air pollutant in the ambient air," § 109 (b)(2).

Within nine months after the Agency's promulgation of primary and secondary air quality standards, each of the 50 States was required to submit to the Agency a plan designed to implement and maintain such standards within its boundaries. § 110 (a)(1) of the Clean Air Act, as added, 84 Stat. 1680, 42 U. S. C. § 1857c-5 (a)(1). The Agency was in turn required to approve each State's

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plan within four months of the deadline for submission, if it had been adopted after public hearings and if it satisfied eight general conditions set forth in § 110 (a)(2).<sup>2</sup>

<sup>2</sup> Section 110 (a)(2), 42 U. S. C. § 1857c-5 (a)(2) is as follows:

"The Administrator shall, within four months after the date required for submission of a plan under paragraph (1), approve or disapprove such plan or each portion thereof. The Administrator shall approve such plan, or any portion thereof, if he determines that it was adopted after reasonable notice and hearing and that—

"(A) (i) in the case of a plan implementing a national primary ambient air quality standard, it provides for the attainment of such primary standard as expeditiously as practicable but (subject to subsection (e)) in no case later than three years from the date of approval of such plan (or any revision thereof to take account of a revised primary standard); and (ii) in the case of a plan implementing a national secondary ambient air quality standard, it specifies a reasonable time at which such secondary standard will be attained;

"(B) it includes emission limitations, schedules, and timetables for compliance with such limitations, and such other measures as may be necessary to insure attainment and maintenance of such primary or secondary standard, including, but not limited to, land-use and transportation controls;

"(C) it includes provision for establishment and operation of appropriate devices, methods, systems, and procedures necessary to (i) monitor, compile, and analyze data on ambient air quality and, (ii) upon request, make such data available to the Administrator;

"(D) it includes a procedure, meeting the requirements of paragraph (4), for review (prior to construction or modification) of the location of new sources to which a standard of performance will apply;

"(E) it contains adequate provisions for intergovernmental cooperation, including measures necessary to insure that emissions of air pollutants from sources located in any air quality control region will not interfere with the attainment or maintenance of such primary or secondary standard in any portion of such region outside of such State or in any other air quality control region;

"(F) it provides (i) necessary assurances that the State will have adequate personnel, funding, and authority to carry out such implementation plan, (ii) requirements for installation of equipment by

Probably the principal of these conditions, and the heart of the 1970 Amendments, is that the plan provide for the attainment of the national primary ambient air quality standards in the particular State "as expeditiously as practicable but . . . in no case later than three years from the date of approval of such plan." § 110 (a) (2)(A). In providing for such attainment, a State's plan must include "emission limitations, schedules, and timetables for compliance with such limitations"; it must also contain such other measures as may be necessary to insure both timely attainment and subsequent maintenance of national ambient air standards. § 110 (a)(2)(B).

Although the Agency itself was newly organized, the States looked to it for guidance in formulating the plans they were required to submit. On April 7, 1971—scarcely three months after the enactment of the Clean Air Amendments—the Agency published proposed guidelines for the preparation, adoption and submission of such

owners or operators of stationary sources to monitor emissions from such sources; (iii) for periodic reports on the nature and amounts of such emissions; (iv) that such reports shall be correlated by the State agency with any emission limitations or standards established pursuant to this Act, which reports shall be available at reasonable times for public inspection; and (v) for authority comparable to that in section 303, and adequate contingency plans to implement such authority;

"(G) it provides, to the extent necessary and practicable, for periodic inspection and testing of motor vehicles to enforce compliance with applicable emission standards; and

"(H) it provides for revision, after public hearings, of such plan (i) from time to time as may be necessary to take account of revisions of such national primary or secondary ambient air quality standard or the availability of improved or more expeditious methods of achieving such primary or secondary standard; or (ii) whenever the Administrator finds on the basis of information available to him that the plan is substantially inadequate to achieve the national ambient air quality primary or secondary standard which it implements."

plans. 36 Fed. Reg. 6680. After receiving numerous comments, including those from respondent Natural Resources Defense Council, Inc. (NRDC), it issued final guidelines on August 14, 1971. See 40 CFR Part 51. The national standards themselves were timely promulgated on April 30, 1971. See 40 CFR Part 50.

No one can doubt that Congress imposed upon the Agency and States a comprehensive planning task of the first magnitude which was to be accomplished in a relatively short time. In the case of the States, it was soon realized that in order to develop the requisite plans within the statutory nine-month deadline, efforts would have to be focused on determining the stringent emission limitations necessary to comply with national standards. This was true even though compliance with the standards would not be necessary until the attainment date, which normally would be three years after Agency approval of a plan. The issue then arose as to how these stringent limitations, which often could not be satisfied without substantial research and investment, should be applied during the period prior to that date.

One approach was that adopted by Florida, under which the plan's emission limitations would not take effect until the attainment date. Under this approach, no source is subject to enforcement actions during the preattainment period, but all are put on notice of the limitations with which they must eventually comply.<sup>3</sup> Since the Florida approach basically does not require preattainment date pollution reductions on the part of those sources which

<sup>3</sup> While sources would not be subject to enforcement actions based on their levels of emissions prior to the attainment date, they could be required to adhere to schedules for the planning, contracting and construction necessary to assure that their emissions would be within permissible levels as of the attainment date. See 40 CFR §§ 51.15 (c), 52.524 (b).

might be able to effect them,<sup>4</sup> the Agency encouraged an alternative approach. Under it a State's emission limitations would be immediately effective. The State, however, would have the authority to grant variances to particular sources which could not immediately comply with the stringent emission limitations necessary to meet the standards.

Georgia chose the Agency's preferred approach.<sup>5</sup> Its plan provided for immediately effective categorical emission limitations, but also incorporated a variance procedure whereby particular sources could obtain individually tailored relief from general requirements. This variance provision, Ga. Code Ann. § 88-912,<sup>6</sup> was one of the bases

<sup>4</sup> At least in the case of Florida, this approach has apparently been modified by subsequent adoption of schedules which require compliance by a number of specified sources prior to July 1, 1975. See 40 CFR § 52.524 (c) (1974).

<sup>5</sup> All other States within the Fifth Circuit, except Florida, also adopted plans with limitations which were effective immediately or, in the case of Texas, only a few months thereafter.

<sup>6</sup> Ga. Code Ann. § 88-912 (1971), is as follows:

**Variances—**

"The department may grant specific or general classes of variances from the particular requirements of any rule, regulation or general order to such specific persons or class of persons or such specific source or general classes of sources of air contaminants upon such conditions as it may deem necessary to protect the public health and welfare, if it finds that strict compliance with such rule, regulation or general order is inappropriate because of conditions beyond the control of the person or classes of persons granted such variances, or because of special circumstances which would render strict compliance unreasonable, unduly burdensome, or impractical due to special physical conditions or causes, or because strict compliance would result in substantial curtailment or closing down of one or more businesses, plants or operations, or because no alternative facility or method of handling is yet available. Such variances may be limited in time. In determining whether or not such variances shall be granted, the department shall give consideration to the protection of the public health, safety and general welfare of the

upon which the Agency's approval of the Georgia plan was successfully challenged by respondents in the Court of Appeals. It is the only aspect of that court's decision as to which the Agency petitioned for certiorari.

## II

The Agency's approval of Georgia's variance provision was based on its interpretation of § 110 (a)(3),<sup>1</sup> which provides that the Agency shall approve any revision of an implementation plan which meets the § 110 (a)(2) requirements applicable to an original plan. The Agency concluded that § 110 (a)(3) permits a State to grant individual variances from generally applicable emission standards, both before and after the attainment date, so long as the variance does not cause the plan to fail to comply with the requirements of § 110 (a)(2). Since that section requires, *inter alia*, that primary ambient air standards be attained by a particular date, it is of some conse-

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public, and weigh the equities involved and the relative advantages and disadvantages to the resident and the occupation or activity affected. Any person or persons seeking a variance shall do so by filing a petition therefor with the director of the department. The director shall promptly investigate such petition and make a recommendation as to the disposition thereof. If such recommendation is against the granting of the variance, a hearing shall be held thereon within 15 days after notice to the petitioner. If the recommendation of the director is for the granting of a variance, the department may do so without a hearing: Provided, however, that upon the petition of any person aggrieved by the granting of a variance, a public hearing shall be held thereon. A variance granted may be revoked or modified by the department after a public hearing which shall be held after giving at least 15 days prior notice. Such notice shall be served upon all persons, known to the department, who will be subjected to greater restrictions if such variance is revoked or modified, or are likely to be affected or who have filed with the department a written request for such notification."

<sup>1</sup> The text of § 110 (a)(3) appears at 13, *infra*.



quence under this approach whether the period for which the variance is sought extends beyond that date. If it does not, the practical effect of treating such preattainment date variances as revisions is that they can be granted rather freely.

This interpretation of § 110 (a)(3) was incorporated in the Agency's original guidelines for implementation plans, 40 CFR §§ 51.6 (c), 51.32 (f).<sup>8</sup> Although a spokesman for respondent NRDC had earlier stated that the Agency's guideline in this regard "correctly provides that variances which do not threaten attainment of a national standard are to be considered revisions of the plan,"<sup>9</sup> that organization later developed second thoughts on the matter. Its present position, in which it is joined by another environmental organization and by two individual respondents who reside in affected air quality control regions within the State of Georgia, is that variances applicable to individual sources may be approved only if they meet the stringent procedural and substantive standards of § 110 (f).<sup>10</sup> This section permits one-year "postponements" of any requirement of a plan, subject to conditions which will be discussed below.

The Court of Appeals agreed with respondents, and ordered the Agency to disapprove Georgia's variance pro-

<sup>8</sup> 40 CFR § 51.32 (f) (1973) is as follows:

"A State's determination to defer the applicability or any portion(s) of the control strategy with respect to such source(s) will not necessitate a request for postponement under this section unless such deferral will prevent attainment or maintenance of a national standard within the time specified in such plan: *Provided, however*, That any such determination will be deemed a revision of an applicable plan under § 51.6."

<sup>9</sup> Hearings, on Implementation of the Clean Air Act Amendments of 1970—Part I (Title I), before the Subcommittee on Air and Water Pollution of the Senate Committee on Public Works, 92d Cong., 2d Sess., 45 and n. 51 (statement of Richard E. Ayres).

<sup>10</sup> The text of § 110 (f) appears at 13-14, *infra*.



vision, although it did not specify which of the § 110 (a)(2) requirements were thereby violated.<sup>11</sup> It held that while the revision authority of § 110 (a)(3) was available for *generally* applicable changes of an implementation plan, the postponement provision of § 110 (f) was the only method by which *individual* sources could obtain relief from applicable emission limitations. In reaching this conclusion the court rejected petitioner's suggestion that whether a proposed variance should be treated as a "revision" under § 110 (a)(3), or as a "postponement" under § 110 (f), depended on whether it would affect attainment of a national ambient air standard, rather than on whether it applied to one source or to many.

Other circuits have also been confronted with this issue, and while none has adopted the Agency's position, all have differed from the Fifth Circuit. The first case was *Natural Resources Defense Council, Inc. v. Environmental Protection Agency*, 478 F. 2d 875 (CA1 1973). For reasons to be discussed, *infra*, at 29-32, the First Circuit rejected the revision authority as a basis for a variance procedure. It nonetheless concluded that prior to the three-year date for mandatory attainment of primary standards, a State could grant variances to sources which could not immediately meet applicable emission limitations. The court reasoned:

"We can see value in permitting a state to impose strict emission limitations now, subject to individual exemptions if practicability warrants; otherwise it may be forced to adopt less stringent limitations in

<sup>11</sup> Other circuits which have ordered the disapproval of implementation plan variance procedures have likewise failed to identify the offended requirement, even though § 110 (a)(2) quite clearly mandates approval of any plan which satisfies its minimum conditions. See n. 2, *supra*. Since petitioner has not raised the point in this Court, we have no occasion to consider it.

order to accommodate those who, notwithstanding reasonable efforts, are as yet unable to comply.

"The Administrator sees his power to allow such exemption procedures as deriving from the 'revision' authority in § [110] (a)(3). We tend to view it more as a necessary adjunct to the statutory scheme, which anticipates greater flexibility during the pre-attainment period." 478 F. 2d, at 887.

The First Circuit's resolution, which has been described as "Solomonesque," is not tied to any specific provision of the Clean Air Act. Rather, it is quite candidly a judicial creation providing flexibility which, according to its creators, Congress may be inferred to have intended to provide. Two other circuits subsequently followed the First Circuit. *Natural Resources Defense Council, Inc. v. Environmental Protection Agency*, 483 F. 2d 690, 693-694 (CA8 1973); *Natural Resources Defense Council, Inc. v. Environmental Protection Agency*, 494 F. 2d 519, 523 (CA2 1974). Neither expanded on the First Circuit's reasoning.

The Ninth Circuit has adopted a third approach to this question, in *Natural Resources Defense Council, Inc. v. Environmental Protection Agency*, 507 F. 2d 905, 911-917 (CA9 1974). After considering legislative history, the Ninth Circuit concluded that Congress did not intend the postponement mechanism to be the exclusive source for variances. But the court also did not adopt the Agency's view that variances could be authorized as § 110 (a)(3) revisions, although it did not explain its rejection of this interpretation. Rather, the Ninth Circuit agreed with the First Circuit that flexibility was "a necessary adjunct to the statutory scheme." It explained:

"As long as a possible variance from a state plan will not preclude the attainment or maintenance of such standards, we discern no legislative intent to commit

a state, in toto, to its initial plan, without any flexibility whatsoever." 507 F. 2d, at 913.

The Ninth Circuit, however, rejected the First Circuit's distinction between the pre- and postattainment periods. It concluded that statutory support for flexibility was as strong after the attainment date as before, especially in light of the Act's encouragement of the States to adopt plans even stricter than those required to attain national standards.<sup>12</sup> The court thus adopted an approach which differs from the Agency's, but which reaches the same result—authorization of variances on standards other than those required for § 110 (f) postponements, both *before and after* the attainment date, so long as the variance does not prevent timely attainment and subsequent maintenance of national ambient air standards.

After the Courts of Appeals for the First, Eighth, Fifth, and Second Circuits had spoken, but prior to the decision of the Ninth Circuit, the Agency modified its guidelines to comply with the then-unanimous rulings that after the attainment date the postponement provision was the only basis for obtaining a variance. 39 Fed. Reg. 34533-34535; 40 CFR §§ 51.11 (g), 51.15 (b), 51.32 (f). At the same time, the Agency formally disapproved variance provisions to the extent they authorized variances extending beyond attainment dates, unless the standards of § 110 (f) were met. 39 Fed. Reg. 34535; 40 CFR § 52.26.

Because the Agency has conformed its regulations to the decisions of the First, Eighth, and Second Circuits, this case on its facts is now limited to the validity of the Georgia variance provision insofar as it authorizes variances effective before Georgia's attainment date, which is in July 1975.<sup>13</sup> The Agency nonetheless has not aban-

<sup>12</sup> See § 116 of the Clean Air Act, as added, 84 Stat. 1689, 42 U. S. C. § 1857d-1.

<sup>13</sup> The attainment dates for several air quality control regions within other Fifth Circuit States are as late as May 31, 1977, by

doned its original view that the revision section authorizes variances which do not interfere with the attainment or maintenance of national ambient air standards. Moreover, the Agency is candid in admitting that should we base our decision on its interpretation of § 110 (a) (3), the decision would support the approval of implementation plans which provide for variances effective after the attainment date.

The disparity among the courts of appeals rather strongly indicates that the question does not admit of an easy answer. Without going so far as to hold that the Agency's construction of the Act was the only one it permissibly could have adopted, we conclude that it was at the very least sufficiently reasonable that it should have been accepted by the reviewing courts.

### III

Both of the sections in controversy are contained in § 110 of the amended Clean Air Act, which is entitled "Implementation Plans." Section 110 (a) (3) provides:

"The Administrator shall approve any revision of an implementation plan applicable to an air quality control region if he determines that it meets the requirement of paragraph (2) and has been adopted by the State after reasonable notice and public hearings."

Section 110 (f) provides:

"(1) Prior to the date on which any stationary source or class of moving sources is required to comply with any requirement of an applicable implementation plan the Governor of the State to which such plan applies may apply to the Administrator to postpone the applicability of such requirement to such

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virtue of two-year extensions granted pursuant to § 110 (e). See n. 20, *infra*.

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source (or class) for not more than one year. If the Administrator determines that—

“(A) good faith efforts have been made to comply with such requirement before such date,

“(B) such source (or class) is unable to comply with such requirement because the necessary technology or other alternative methods of control are not available or have not been available for a sufficient period of time,

“(C) any available alternative operating procedures and interim control measures have reduced or will reduce the impact of such source on public health, and

“(D) the continued operation of such source is essential to national security or to the public health or welfare,

“then the Administrator shall grant a postponement of such requirement.”<sup>14</sup>

<sup>14</sup> Section 110 (f) (2) specifies the procedural requirements for postponement. It is as follows:

“(2) (A) Any determination under paragraph (1), shall (i) be made on the record after notice to interested persons and opportunity for hearing, (ii) be based upon a fair evaluation of the entire record at such hearing, and (iii) include a statement setting forth in detail the findings and conclusions upon which the determination is based.

“(B) Any determination made pursuant to this paragraph shall be subject to judicial review by the United States court of appeals for the circuit which includes such State upon the filing in such court within 30 days from the date of such decision of a petition by any interested person praying that the decision be modified or set aside in whole or in part. A copy of the petition shall forthwith be sent by registered or certified mail to the Administrator and thereupon the Administrator shall certify and file in such court the record upon which the final decision complained of was issued, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition the court shall have jurisdiction to affirm or set aside the determination complained of in whole or in part. The

As previously noted, respondents contend that "variances" applicable to individual sources—for example, a particular factory—may be approved only if they meet the stringent procedural and substantive standards set forth in § 110 (f). As is apparent from the text of § 110 (f), its postponements may be for no more than one year, may be granted only if application is made prior to the date of required compliance, and must be supported by the Agency's determination that the source's continued operation "is essential to national security or to the public health or welfare." Petitioner, on the other hand, relies on the revision authority of § 110 (a) (3) for the contention that a state plan may provide for an individual variance from generally applicable emission limitations so long as the variance does not cause the plan to fail to comply with the requirements of § 110 (a) (2). Since a variance would normally implicate only the § 110 (a) (2) (A) requirement that plans provide for attainment and maintenance of national ambient air standards, treatment as revisions would result in variances being readily approved in two situations: first, where the variance does not defer compliance beyond the attainment date;<sup>15</sup> and

findings of the Administrator with respect to questions of fact (including each determination made under subparagraphs (A), (B), (C), and (D) of paragraph (1)) shall be sustained if based upon a fair evaluation of the entire record at such hearing.

"(C) Proceedings before the court under this paragraph shall take precedence over all the other causes of action on the docket and shall be assigned for hearing and decision at the earliest practicable date and expedited in every way.

"(D) Section 307 (a) of this title (relating to subpoenas) shall be applicable to any proceeding under this subsection."

<sup>15</sup> We recognize that attainment of the standards is required as soon as "practicable," and that a preattainment variance could not be granted under the revision authority if immediate compliance by a particular source were "practicable" and such compliance would expedite attainment. See p. 34 n. 30; *infra*.



second, where the national standards have been attained and the variance is not so great that a plan incorporating it could not insure their continued maintenance. Moreover, a § 110 (a) (3) revision may be granted on the basis of hearings conducted by the State, whereas a § 110 (f) postponement is available only after the Agency itself conducts hearings.

There is thus considerable practical importance attached to the issue of whether variances are to be treated as revisions or as postponements, or for that matter, as the First Circuit would have it, as neither until the mandatory attainment date but as postponements thereafter. This practical importance reaches not merely the operator of a particular source who believes that circumstances justify his receiving a variance from categorical limitations. It also reaches the broader issue of whether Congress intended the States to retain any significant degree of control of the manner in which they attain and maintain national standards, at least once their initial plans have been approved or, under the First Circuit's approach, once the mandatory attainment date has arrived. To explain our conclusion as to Congress' intent, it is necessary that we consider the revision and postponement sections in the context of other provisions of the amended Clean Air Act, particularly those which distinguish between national ambient air standards and emission limitations.

As we have already noted, primary ambient air standards deal with the quality of outdoor air, and are fixed on a nationwide basis at levels which the Agency determines will protect the public health. It is attainment and maintenance of these national standards which § 110 (a) (2) (A) requires that state plans provide. In complying with this requirement a State's plan must include "emission limitations," which are regulations of the composi-

tion of substances emitted into the ambient air from such sources as power plants, service stations, and the like. They are the specific rules to which operators of pollution sources are subject, and which if enforced should result in ambient air which meets the national standards.

The Agency is plainly charged by the Act with the responsibility for setting the national ambient air standards. Just as plainly, however, it is relegated by the Act to a secondary role in the process of determining and enforcing the specific, source-by-source emission limitations which are necessary if the national standards it has set are to be met.<sup>16</sup> Under § 110 (a) (2), the Agency is *required* to approve a state plan which provides for the timely attainment and subsequent maintenance of ambient air standards, and which also satisfies that section's other general requirements. The Act gives the Agency no authority to question the wisdom of a State's choices of emission limitations if they are part of a plan which satisfies the standards of § 110 (a) (2), and the Agency may devise and promulgate a specific plan of its own only if a State fails to submit an implementation plan which satisfies those standards. § 110 (c). Thus, so long as the ultimate effect of a State's choice of emission limitations is compliance with the national standards for ambient air, the State is at liberty to adopt whatever mix of emission limitations it deems best suited to its particular situation.

<sup>16</sup> Exceptions are the Agency's authority to set emission limitations for new motor vehicles, § 202 *et seq.* of the Clean Air Act, as amended, 84 Stat. 1690-1698, 42 U. S. C. § 1957f-1 *et seq.*; to set emission limitations for aircraft, § 231 *et seq.* of the Clean Air Act, as added, 84 Stat. 1703-1705, 42 U. S. C. § 1857f-9 *et seq.*; to set emission limitations for categories of new stationary sources, § 111 of the Clean Air Act, as added, 84 Stat. 1683-1684, 42 U. S. C. § 1857c-6; and to regulate the sale of fuels and fuel additives, § 211 of the Clean Air Act, as amended, 84 Stat. 1698-1700, 42 U. S. C. § 1857f-6c.



This analysis of the Act's division of responsibility is not challenged by respondents insofar as it concerns the process of devising and promulgating an initial implementation plan. Respondents do, however, deny that the States have such latitude once the initial plan is approved. Yet the third paragraph of § 110 (a), and the one immediately following the paragraphs which specify that States shall file implementation plans and that the Agency shall approve them if they satisfy certain broad criteria, is the section which *requires* the Agency to "approve any revision of an implementation plan" if it "determines that it meets the requirements" of § 110 (a)(2). On its face, this provision applies to *any* revision, without regard either to its breadth of applicability, or to whether it is to be effective before or after the attainment date; rather, Agency approval is subject only to the condition that the revised plan satisfy the general requirements applicable to original implementation plans. Far from evincing congressional intent that the Agency assume control of a State's emission limitations mix once its initial plan is approved, the revision section is to all appearances the mechanism by which the States may obtain approval of their developing policy choices as to the most practicable and desirable methods of restricting total emissions to a level which is consistent with the national ambient air standards.

In order to challenge this characterization of § 110 (a)(3), respondents principally rely on the contention that the postponement provision, § 110 (f), is the only mechanism by which exceptions to a plan's requirements may be obtained, under any circumstances. Were this an accurate description of § 110 (f), we would agree that the revision authority does not have the broad application asserted by the Agency. Like the Ninth Circuit,<sup>17</sup> how-

<sup>17</sup> *Natural Resources Defense Council, Inc. v. Environmental Protection Agency*, 507 F. 2d 905, 911-913 (1974).

ever, we believe that § 110 (f) serves a function different from that of supervising state efforts to modify the initial mix of emission limitations by which they implement national standards.

In our view, § 110 (f) is a safety valve by which may be accorded, under certain carefully specified circumstances, exceptions to the national standards themselves. That this is its role is strongly suggested by the process by which it became a part of the Clean Air Act. The House version of the Amendment, H. R. 17255, 91st Cong., 2d Sess., contained no provisions for either postponements or, most significantly, mandatory deadlines for the attainment of national ambient air standards. The Senate bill, S. 4358, 91st Cong., 2d Sess., did contain both the three-year deadline, which now appears in § 110 (a) (2), and the predecessor of the present § 110 (f). That predecessor<sup>18</sup> permitted the governor of a

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<sup>18</sup> Proposed § 111 (f) of the Clean Air Act, as proposed to be added by S. 4358, 91st Cong., 2d Sess., is as follows:

"(1) No later than one year before the expiration of the period for the attainment of ambient air of the quality established for any national ambient air quality standard promulgated pursuant to section 110 of this Act, the Governor of a State in which is located all or part of an air quality control region designated or established pursuant to this Act may file a petition in the district court of the United States for the district in which all or a part of such air quality control region is located against the United States for relief from the effect of such expiration (A) on such region or portion thereof, or (B) on a person or persons in such air quality control region. In the event that such region is an interstate air quality control region or portion thereof, any Governor of any State which is wholly or partially included in such interstate region shall be permitted to intervene for the presentation of evidence and argument on the question of such relief.

"(2) Any action brought pursuant to this subsection shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28 of the United States Code and appeal shall be to the Supreme Court. Proceedings before the three

State to petition a three-judge District Court for "relief from the effect" of expiration of the three-year deadline as to a region or persons, and provided for the grant of

judge court, as authorized by this subsection, shall take precedence on the docket over all other causes of action and shall be assigned for hearing and decision at the earliest practicable date and expedited in every way.

"(3) (A) In any such proceeding the Secretary shall intervene for the purpose of presenting evidence and argument on the question of whether relief should be granted.

"(B) The court, in its discretion, may permit any interested person residing in any affected State to intervene for the presentation of evidence and argument on the question of relief.

"(4) The court, in view of the paramount interest of the United States in achieving ambient air quality necessary to protect the health of persons shall grant relief only if it determines such relief is essential to the public interest and the general welfare of the persons in such region, after finding—

"(A) that substantial efforts have been made to protect the health of persons in such region; and

"(B) that means to control emissions causing or contributing to such failure are not available or have not been available for a sufficient period to achieve compliance prior to the expiration of the period to attain an applicable standard; or

"(C) that the failure to achieve such ambient air quality standard is caused by emissions from a Federal facility for which the President has granted an exemption pursuant to section 118 of this Act.

"(5) The court, in granting such relief shall not extend the period established by this Act for more than one year and may grant renewals for additional one year periods only after the filing of a new petition with the court.

"(6) The Secretary, in consultation with any affected State or States, shall take such action as may be necessary to modify any implementation plan or formulate any new implementation plan for the period of such extension.

"(7) No extension granted pursuant to this section shall effect compliance with any emission requirement, timetable, schedule of compliance, or other element of any implementation plan unless such requirement, timetable, schedule of compliance, or other element of such plan is the subject of the specific order extending the time for compliance with such national ambient air quality standard."

such relief upon a showing of conditions similar to those now appearing in § 110 (f). Under its language the postponement provision plainly applied only when deferral of a national deadline was sought.<sup>19</sup>

The Conference Committee adopted the Senate's general approach to the deadline issue. Its report states:

*"The conference substitute follows the Senate amendment in establishing deadlines for implementing primary ambient air quality standards but leaves the States free to establish a reasonable time period within which secondary ambient air quality standards will be implemented. The conference substitute modifies the Senate amendment in that it allows the Administrator to grant extensions for good causes shown upon application by the Governors."* H. Conf. Rep. No. 91-1783, 91st Cong., 2d Sess., 45. (Emphasis added.)

Nowhere does the report suggest that other changes in the Senate's proposed § 111 (f) were intended to dramatically broaden its reach, such that it would not merely be available to obtain deferral of the strict deadlines for compliance with national standards, but would also be the exclusive mechanism for any ameliorative modification of a plan, no matter how minor.

<sup>19</sup> This fact, as well as the "safety valve" nature of the Senate's predecessor to the postponement provision, is also apparent from the Senate report:

"Finally, the Committee would recognize that compliance with the national ambient air quality standards deadline may not be possible. If a Governor judges that any region or portions thereof within his State will not meet the national ambient air quality standard within the time provided, [section 111 (f) of] the bill would authorize him—one year before the deadline—to file a petition against the United States in the District Court of the United States for the district where such region or portion thereof is located for relief from the effect of such expiration." S. Rep. No. 91-1196, 91st Cong., 2d Sess., 14-15 (1970).

That the postponement provision was intended merely as a method of escape from the mandatory deadlines becomes even clearer when one considers the summary of the conference's work which Senator Muskie presented to the Senate. The summary referred to a provision under which a single two-year extension of the deadline could be obtained were it shown to be necessary at the time a State's initial plan was submitted. It then immediately discussed the postponement provision, as follows:

"A Governor may also apply for a postponement of *the deadline* if, when *the deadline* approaches, it is impossible for a source to meet a requirement under an implementation plan, interim control measures have reduced (or will reduce) the adverse health effects of the source, and the continued operation of the source is essential to national security or the public health or welfare of that State." 116 Cong. Rec. 42384-42385. (Emphasis added.)

This limited view of the role of § 110 (f) is reinforced by comparison with the section which immediately precedes it in the statute, § 110 (e).<sup>20</sup> This is the provision

<sup>20</sup> Section 110 (e), 42 U. S. C. § 1857e-5 (e), is as follows:

"(1) Upon application of a Governor of a State at the time of submission of any plan implementing a national ambient air quality primary standard, the Administrator may (subject to paragraph (2)) extend the three-year period referred to in subsection (a)(2) (A)(i) for not more than two years for an air quality control region if after review of such plan the Administrator determines that—

"(A) one or more emission sources (or classes of moving sources) are unable to comply with the requirements of such plan which implement such primary standard because the necessary technology or other alternatives are not available or will not be available soon enough to permit compliance within such three-year period, and

"(B) the State has considered and applied as a part of its plan reasonably available alternative means of attaining such primary

to which Senator Muskie's summary was obviously referring when it stated that the three-year deadline could be extended for up to two years if proper application were made at the time a State first submitted its plan. Like § 110 (f), § 110 (e) is available only if an emission source is unable to comply with plan requirements because "the necessary technology or other alternatives are not available or will not be available soon enough to permit compliance." Section 110 (e) also contains a requirement parallel to that of § 110 (f)(1)(C), that available alternative procedures and control measures have been considered and utilized. Unlike § 110 (f), however, § 110 (e) contains no requirement that "the continued operation of such source is essential to national security or to the public health or welfare." Section 110 (e) thus permits a two-year extension on a showing considerably less stringent than that required for a § 110 (f) one-year postponement. This disparity is quite logical, however, because the relief under § 110 (e) is limited to an initial two-year period, whereas that under § 110 (f) is available at any time, so long as application is made prior to the effective date of the relevant requirement.<sup>21</sup>

standard and has justifiably concluded that attainment of such primary standard within the three years cannot be achieved.

"(2) The Administrator may grant an extension under paragraph (1) only if he determines that the State plan provides for—

"(A) application of the requirements of the plan which implement such primary standard to all emission sources in such region other than the sources (or classes) described in paragraph (1)(A) within the three-year period, and

"(B) such interim measures of control of the sources (or classes) described in paragraph (1)(A) as the Administrator determines to be reasonable under the circumstances."

<sup>21</sup> The language of § 110 (f) would also seem to support any number of successive one-year postponements, so long as application were timely. There is potentially some dispute as to this, however, because the Conference Committee deleted, without comment, language

On the other hand, the disparity between the standards of § 110 (e) and those of § 110 (f) would be inexplicable were § 110 (f) also the sole mechanism by which States could modify the particular emission limitations mix incorporated in their initial implementation plans, even though the desired modifications would have no impact on the attainment or maintenance of national standards. Respondents' interpretation requires the anomalous conclusion that Congress, having stated its goal to be the attainment and maintenance of specified ambient air standards, nonetheless made it significantly more difficult for a State to modify an emission limitations mix which met those standards both before and after modification than for a State to obtain a two-year deferral in the attainment of the standards themselves. The interpretation suffers, therefore, not only from its contrariety to the revision authority which Congress provided, but also from its willingness to ascribe inconsistency to a carefully considered congressional enactment.

We believe that the foregoing analysis of the structure and legislative history of the Clean Air Amendments shows that Congress intended to impose national ambient air standards to be attained within a specific period of time. It also shows that in §§ 110 (e) and (f) Congress carefully limited the circumstances in which timely attainment and subsequent maintenance of these standards could be compromised. We also believe that Congress, consistent with its declaration that, "Each State

in the Senate predecessor to § 110 (f) that explicitly permitted successive postponements. See proposed § 111 (f)(5) of the Clean Air Act, as proposed to be added by S. 4358, 91st Cong., 2d Sess., n. 18, *supra*. This question is not presented by this case, and we do not decide it. We simply note the possibility of successive postponements as an additional element which would reasonably explain the imposition of harsher standards in § 110 (f) than in § 110 (e).



shall have the primary responsibility for assuring air quality" within its boundaries. § 107 (a), left to the States considerable latitude in determining specifically how the standards would be met. This discretion includes the continuing authority to revise choices about the mix of emission limitations. We therefore conclude that the Agency's interpretation of §§ 110 (a)(3) and 110 (f) was "correct," to the extent that it can be said with complete assurance that any particular interpretation of a complex statute such as this is the "correct" one. Given this conclusion, as well as the facts that the Agency is charged with administration of the Act, and that there has undoubtedly been reliance upon its interpretation by the States and other parties affected by the Act, we have no doubt whatever that its construction was sufficiently reasonable to preclude the Court of Appeals from substituting its judgment for that of the Agency. *Udall v. Tallman*, 380 U. S. 1, 16-18 (1965); *McLaren v. Fleischer*, 256 U. S. 477, 480-481 (1921). We are not persuaded to the contrary by any of the arguments advanced by respondents or by the courts of appeals which have rejected § 110 (a)(3) as authority for granting variances. To these various arguments we now turn.

#### IV

The principal basis on which the Fifth Circuit rejected the Agency's view of the revision and postponement sections was its analysis of their language. The court focused first on the fact that § 110 (f) speaks in terms of "any stationary source," and of the postponement of "any requirement of an applicable implementation plan." (Emphasis added.) This language, according to the Fifth Circuit, belies the Agency's contention that the postponement section is inapplicable to those variances which do not jeopardize the attainment or maintenance



of national standards. The court went on to state, without citation or supporting reasoning:

"A revision is a change in a generally applicable requirement; a postponement or variance [is a] change in the application of a requirement to a particular party. The distinction between the two is familiar and clear." 489 F. 2d, at 401.

We think that the Fifth Circuit has read more into § 110 (f), and more out of § 110 (a)(3), than careful analysis can sustain. In the first place, the "any stationary source" and "any requirement" language of § 110 (f) serves only to define the matters with respect to which the governor of a State *may* apply for a postponement. The language does not, as the Fifth Circuit would have it, state that all sources desirous of any form of relief *must* rely solely on the postponement provision. While § 110 (f) makes its relief available to any source which can qualify for it, regardless of whether the relief would jeopardize national standards, the section does not even suggest that other forms of relief, having no impact on the national goal of achieving air quality standards, are not also available on appropriately less rigorous showings.

As for the Fifth Circuit's observation that "a revision is a change in a generally applicable requirement," whereas a "postponement or variance" deals with particular parties, we are not satisfied that the distinction is so "familiar and clear." While a variance is generally thought to be of specific applicability,<sup>22</sup> whether a revision

<sup>22</sup> We note however that there may be substantial difficulties in determining whether a proposed modification is of general or specific application. Requirements written in general terms may in fact be of very specific impact, as a result of the limited number of similar sources, or even of conscious efforts to evade restrictions on "specific" changes. For example, the regulation at issue in *Getty*

is general or specific depends on what is being revised. In this instance, it is implementation plans which are being revised, and it is clear that such plans may be quite detailed, both as to sources and the remedial steps required of the sources. Not only does § 110 (a)(2)(B) specify that a plan shall include "emission limitations, schedules, and timetables for compliance,"<sup>23</sup> but respondents themselves have urged that the very specific variances which have already been granted in Georgia should have been, and may still be, treated as "compliance schedules" contained within the original plan.<sup>24</sup>

A further difficulty with the Fifth Circuit's analysis of the language of §§ 110 (a)(3) and 110 (f) is that it entirely overlooks an obvious distinction between revisions and postponements. In normal usage, to "postpone" is to defer, whereas to "revise" is to remake or amend. In the implementation plan context, normal usage would suggest that a postponement is a deferral of the effective date of a requirement which remains a part of the applicable plan, whereas a revision is a change in the plan itself which deletes or modifies the requirement. If by revision a requirement of a plan is *removed*, then a person seeking relief from that requirement has no

*Oil Co. v. Ruckelshaus*, 467 F.2d 349 (CA3 1972), spoke of all fuel burning equipment having a maximum rate of heat input equal to or greater than 500 million Btu per hour, and located in New Castle County, Del., south of U. S. Route 40. There was only one such installation.

<sup>23</sup> The Florida plan, for example, presently contains compliance schedules which specify not merely particular business operations, but also the principal emission sources within particular operations. See 40 CFR § 52.524 (c) (1974).

<sup>24</sup> Brief for Respondents 48-49. Respondents do not, however, suggest any statutory basis for incorporating compliance schedules into a plan once it has been approved. We know of none save the revision authority which respondents would have us declare unavailable for modifications of a specific nature.

need to seek its *postponement*, and § 110 (f) is by its terms inapplicable. But if such a person cannot obtain a revision, because for example the plan as so revised would no longer insure timely attainment of the national standards, then under the Act he has no alternative but to comply or to obtain a postponement of the requirement's effective date—if he can satisfy the stringent conditions of § 110 (f). This distinction between the two is so straightforward, and so consistent with the structure and history of the Act, as discussed in Part III of this opinion, that we perceive no basis for the Fifth Circuit's strained line of analysis.<sup>25</sup>

The Fifth Circuit also relied on the "technology forcing" nature of the Clean Air Amendments of 1970. It reasoned that because the statute was intended to force technology to meet specified, scheduled standards, it was essential to insure that commitments made at the

<sup>25</sup> Much of the confusion which has afflicted the Fifth Circuit and the other courts of appeals probably has been generated by the States' practice of referring to exceptions from categorical limitations as "variances" rather than as "revised compliance schedules," and also by the fact that in practice a "variance" typically has the effect of deferring the date on which compliance with categorical limitations is required. Our concern however, is not with the nomenclature assigned to exceptions, but rather with whether they are of a nature that may be authorized as § 110 (a) (3) revisions. That an exception which does not jeopardize national standards may in effect be a deferral does not change the facts (1) that it revises a plan from one which requires a source to comply by, say, July 1972, to one which requires its compliance as of, say, May 1975, and (2) that the plan as so revised still possesses all of the characteristics which it must under § 110 (a) (2). An exception which *does* jeopardize national standards, on the other hand, cannot be a revision because it would deprive the revised plan of a characteristic without which it cannot under the Act be an applicable plan. See § 110 (d) which defines "applicable plan" as the "implementation plan, or most recent revision thereof, which has been approved under [§ 110 (a) (2)] . . . ." Such an exception must be obtained, if at all, as a postponement of the requirements of the applicable plan.

planning stage could not be readily abandoned when the time for compliance arrived. According to the Fifth Circuit, § 110 (f) "is the device Congress chose to assure this." 489 F. 2d, at 401. Clearly § 110 (f) does present a formidable hurdle for those proposed departures from earlier commitments which are in fact subject to its stringent conditions. What the Fifth Circuit failed to consider, however, is that so long as the national standards are being attained and maintained, there is no basis in the present Clean Air Act for forcing further technological developments. Agency review assures that variances granted under § 110 (a) (3) will be consistent with the § 110 (a) (2) (A) requirement that the national standards be attained as expeditiously as practicable and maintained thereafter. Thus § 110 (a) (3) variances *ex hypothesi* do not jeopardize national standards, and the technology-forcing character of the Amendments is no reason at all for judging them under the provisions of § 110 (f).

The First Circuit also rejected the Agency's contention that variances could be handled under the revision procedure, *supra*, at 10-11, but it did so for reasons different from those relied upon by the Fifth Circuit.<sup>26</sup> It stated:

"... Had Congress meant [§ 110 (f)] to be followed

<sup>26</sup> The First Circuit's decision was strongly criticized in Comment, Variance Procedures under the Clean Air Act: The Need for Flexibility, 15 Wm. & M. L. Rev. 324 (1973). The Comment was especially concerned with the conclusion that § 110 (f) was the exclusive postattainment variance mechanism, focusing on this conclusion's lack of support in the statute and legislative history, on its inconsistency with other provisions of the statute, and on its untoward results. A second commentator, writing prior to any of the circuit court decisions, reached conclusions similar to those we today express. Luncberg, Federal-State Interaction under the Clean Air Amendments of 1970, 14 B. C. Ind. & Com. L. Rev. 637 (1973) (at the time he wrote this article, Mr. Luncberg was an attorney in the Enforcement Division, Environmental Protection Agency, Region I).

only if a polluter, besides violating objective state requirements, was shown to be preventing maintenance of a national standard, it would have said so. To allow a polluter to raise and perhaps litigate that issue is to invite protracted delay. The factual question could have endless refinements: is it the individual variance-seeker or others whose pollution is preventing maintenance of standards? See *e. g.*, *Getty Oil Company v. Ruckelshaus*, 342 F. Supp. 1006 (D. Del. 1972), remanded with directions, 467 F. 2d 349 (3rd Cir. 1972), . . . where *Getty* raised this issue in various forums." 478 F. 2d, at 886.

Respondents also stress this argument: that treating variances as revisions rather than as postponements would invite litigation, would be impractical in application, and would therefore result in degradation of the environment. Aside from the fact that it goes more to the wisdom of what Congress has chosen to do than to determining what Congress has done, we believe this argument to be overstated. As made clear in the *Getty* case cited by the First Circuit, a polluter is subject to existing requirements until such time as he obtains a variance, and variances are not available under the revision authority until they have been approved by both the State and Agency. Should either entity determine that granting the variance would prevent attainment or maintenance of national air standards, the polluter is presumably within his rights in seeking judicial review. This litigation, however, is carried out on the polluter's time, not the public's, for during its pendency the original regulations remain in effect, and the polluter's failure to comply may subject him to a variety of enforcement procedures.<sup>27</sup>

<sup>27</sup> Emission limitations contained in an implementation plan may be enforced in several ways. Aside from whatever state procedures are available under the plan, § 113 of the Clean Air Act, as added, 84 Stat. 1686, 42 U. S. C. § 1857c-8, imposes a duty of enforcement on

We are further impressed that the Agency itself has displayed no concern for the purported administrative difficulty of treating variances as revisions. Ordinarily, an agency may be assumed capable of meeting the responsibilities which it contends are placed upon it. Were respondents able to make a contrary showing, that fact might have some weight in interpreting Congress' intent, although we would doubt its relevance unless Congress were also shown to have been aware of the problem when it drafted legislation which otherwise is consistent with the Agency's contentions. Respondents have made no such showings. The judgments which the Agency must make when passing on variances under § 110 (a) (3) are whether the ambient air complies with national standards, and if so whether a proposed variance would cause a plan to fail to insure maintenance of those standards. These judgments are little different from those which the Agency had to make when it approved the initial plans into which respondents seek to have the States frozen. In each instance the Agency must measure the existing level of pollution, compare it with the national standards, and determine the effect on this comparison of specified emission modifications.<sup>26</sup> That Congress is of the opinion

the Agency. The Agency may issue compliance orders (the violation of which carries severe monetary penalties), or it may bring civil actions for injunctive relief. In addition, § 304 of the Clean Air Act, as added, 84 Stat. 1706, 42 U. S. C. § 1857b-2 provides for citizen suits against any person alleged to be in violation of an emission limitation, and against the Administrator where he is alleged to have failed to perform a nondiscretionary act. Plaintiffs in such actions may be awarded attorneys fees. § 304 (d).

<sup>26</sup> We recognize that numerous applications for changes of a specific nature have a potential for creating a different kind of problem from that posed by the formulation of general regulations. Such a problem would arise when the grant of a variance to one source would not affect national standards, but the simultaneous or subsequent grant of similar variances to similar sources could result in the plan's

that the Agency can feasibly and reliably perform these functions is manifest not only in its 1970 legislation, but also in a 1974 amendment designed to conserve energy. The amendment provides that the Agency should report to each State on whether its implementation plan could be revised in relation to fuel burning stationary sources, "*without interfering with the attainment and maintenance of any national ambient air quality standard.*" § 110 (a) (3) (B) of the Clean Air Act, as added, 88 Stat. 256, 42 U. S. C. § 1857e-5 (a) (3) (B). (Emphasis added.)

## V

Respondents have put forward several additional arguments which have not been specifically adopted by any court of appeals. The first is based on legislative history. Respondents focus on the fact that while the Conference Committee accepted the Senate's concept of a three-year maximum deadline for attainment of national standards, it also strengthened the Senate's provision by specifying that attainment should be achieved "*as expeditiously as practicable . . . but in no case later than three years.*" (Emphasis added.) Respondents further make the contention

failure to insure the attainment and maintenance of the standards. As we have noted in the text, however, the agency charged with the administration of the Act, and made ultimately responsible for the attainment and maintenance of the national standards, does not view this problem as anywhere near insurmountable. Variances under § 110 (a) (3) cannot be granted until first the State, and then the Agency, have determined that they will not jeopardize the standards. We cannot and do not attempt to foresee, at this stage in the administration of the statute, all of the questions, say nothing of the answers, that may arise in the allocation of a limited number of available variances. The fact that the interpretation placed on the section by the Agency may on occasion require administrative flexibility and ingenuity to a greater degree than would a more rigid alternative is not of course a reason for rejecting the Agency's otherwise reasonable construction.

that the Conference Committee altered the Senate's version of the postponement provision to "provide that a source's attempt to delay compliance with 'any requirement' of a State Plan would be considered a 'postponement.'" Brief for Respondents 36. According to respondents the latter change "was necessary to conform" the postponement provision with the Conference Committee's "as expeditiously as practicable" requirement.<sup>29</sup>

<sup>29</sup> Compare the language of § 110 (f), pp. 13-14, *supra*, with that of the Senate's proposed § 111 (f), n. 18, *supra*. In light of our textual comments concerning respondents' interpretation of the Conference Committee's changes, we think that a considerably simpler and more satisfactory explanation is available. The most substantial difference between the two, other than the forum for decision, is that § 110 (f) is triggered by an application filed prior to the date of compliance with any requirement of a plan, whereas § 111 (f) is triggered by a filing at least a year prior to the deadline for attainment. The Conference Committee's change can be quite reasonably viewed as a recognition that the extreme circumstances justifying breach of the national standards could be present with respect to a requirement taking effect either before or after the attainment date. Such might occur, for example, if technological difficulties should prevent required preattainment construction of necessary abatement equipment, or if increasing population density should eventually cause more stringent limitations to be necessary to maintain the national standards. Once it is determined that postponements should be available with regard to any requirement of a plan, and not merely to those tied directly to the attainment date, then the change from "region" and "person or persons" to "any stationary source or class of moving sources" follows rather naturally. The latter phrase is far more convenient for use in conjunction with "any requirement of an applicable implementation plan," yet is not significantly more or less inclusive than the former (while the final version requires source-by-source postponements, and does not provide for relief with respect to an entire region, that requirement was in any event implicit in proposed § 111 (f)(4)'s conditions for granting relief; and while "class of moving sources" is less inclusive than "person or persons," the restriction is not only sensible in light of the small emissions from any single moving source, but it also has no discernible relevance to our inquiry).



The argument is that because any variance would delay attainment of national standards beyond the date previously considered the earliest practicable, and that because the Act requires attainment as soon as practicable, any variance must therefore be treated as a postponement. This argument is not persuasive, for multiple reasons.

First, this interpretation of the Conference Committee's work finds no specific support in legislative documents or debates. This is true despite the significance of the change which, under respondents' interpretation, was made—the expansion of § 110 (f) from a safety valve against mandatory deadlines into the exclusive mechanism by which a State could make even minor modifications of its emission limitations mix. Respondents' interpretation arises instead from their own reading of the statute and inferences as to legislative purpose. Second, as we have already discussed, and contrary to respondents' contention, § 110 (f) simply does not state that any deferral of compliance with "any requirement" of a state plan "would be considered a postponement." Rather, it merely states that a postponement *may* be sought with respect to any source and any requirement.

Third, respondents' reading equates "practicable" in § 110 (a)(2)(A) with § 110 (f)'s "essential to national security or to the public health or welfare." Yet plainly there could be many circumstances in which attainment in less than three years would be impracticable, and thus not required, but in which deferral could not possibly be justified as essential to the national security, or public health or welfare.<sup>30</sup> Fourth, the statute requires only

<sup>30</sup> Whether the Georgia variance provision meets the practicability standard with regard to preattainment variances is a different issue. It authorizes variances on the basis of conditions beyond the control of the persons involved, on the basis of circumstances which would render strict compliance "unreasonable, unduly burdensome,

attainment as expeditiously as practicable, not attainment as expeditiously as was *thought* practicable when the initial implementation plan was devised. Finally, even if respondents' argument had force with regard to a preattainment variance, it would still be of no relevance whatsoever once the national standards were attained. A variance which does not compromise national standards that have been attained does no damage to the congressional goals of attaining the standards as expeditiously as practicable and maintaining them thereafter.

The last of respondents' arguments which merit our attention is related to the Fifth Circuit's conclusion that revisions are restricted to general requirements, and that all specific modifications must therefore be funneled through the postponement provision. Respondents go one step further and contend that the revision authority is limited not only to general changes, but to those which also are initiated by the Agency in order to "accelerate abatement or attain it in greater concert with other national goals." Brief for Respondents 26. This highly restrictive view of § 110 (a)(3) is based on § 110 (a) (2)(H),<sup>31</sup> which specifies that to obtain Agency approval a State's plan must provide a mechanism for revision to take account of revised national standards, of more expeditious methods of achieving the standards, and of Agency determinations that a plan is substantially inadequate.

The argument is specious. Section 110 (a)(2)(H) or impractical," on the basis of findings that strict compliance would result in substantial curtailment or closing down of business operations, and because alternatives are not yet available. See n. 6, *supra*. Respondents, however, did not attack the Georgia variance procedure on this more limited ground, and we need not consider the issue.

<sup>31</sup> See n. 2, *supra*.

does nothing more than impose a minimum requirement that state plans be capable of such modifications as are necessary to meet the basic goal of cleansing the ambient air to the extent necessary to protect public health, as expeditiously as practicable within a three-year period. The section in no way prevents the States from also permitting ameliorative revisions which do not compromise the basic goal. Nor does it, by requiring a particular type of revision, preclude those of a different type. As we have already noted, § 110 (a)(3) requires the Agency to approve "any revision" which is consistent with § 110 (a)(2)'s minimum standards for an initial plan, and which the State adopted after reasonable public notice and hearing; no other restrictions whatsoever are placed on the Agency's duty to approve revisions.<sup>32</sup>

## VI

For the foregoing reasons, the Court of Appeals for the Fifth Circuit was in error when it concluded that the postponement provision of § 110 (f) is the sole method by which may be obtained specific ameliorative modifications of state implementation plans. The Agency had properly concluded that the revision mechanism of § 110 (a)(3) is available for the approval of those variances which do not compromise the basic statutory mandate that, with carefully circumscribed exceptions, the national primary ambient air standards be attained in not more

<sup>32</sup> Respondents also claim that their view of revisions is supported by the context in which the term is used in other parts of the amended Act. We disagree. Two instances, §§ 110 (a)(2)(A)(i) and 110 (c)(3), are references to the revision mechanism required by § 110 (a)(2)(H), but do not suggest that there may not also be other types of revisions. The other two, §§ 110 (a)(1) and 110 (d), are entirely neutral both in terms of whether revisions are specific or general and in terms of whether they may occur independently of § 110 (a)(2)(H).

than three years, and maintained thereafter. To the extent that the judgment of the Court of Appeals for the Fifth Circuit was to the contrary, it is reversed and the cause is remanded for further proceedings consistent with this opinion.

MR. JUSTICE DOUGLAS dissents.

MR. JUSTICE POWELL took no part in the consideration or decision of this case.